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MILITARY LAW

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PRECEDENTS.

BY

WILLIAM WINTHROP,
Colonel, United States Army,
AUTHOR OF THE ANNOTATED DIGEST OF OPINIONS
OF THE JUDGE ADVOCATES GENERAL.

Second Edition, Revised and Enlarged.

IN TWO VOLUMES.

VOL. I.

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Rec. Feb. 25, 1896.

TO

HON. MARTIN F. MORRIS,

ASSOCIATE JUSTICE OF THE COURT OF APPEALS OF THE
DISTRICT OF COLUMBIA,

AS A TRIBUTE TO HIS EMINENCE AS A LAWYER AND A JUDGE,
AND AS AN EXPRESSION OF THE AUTHOR'S PERSONAL
ATTACHMENT AND ADMIRATION,

THIS WORK IS RESPECTFULLY DEDICATED.

PREFACE TO THE FIRST EDITION OF 1886.

IN view of the absence and want of a comprehensive treatise on the science of Military Law, it has been for some years the purpose of the author—a member of the bar in the practice of his profession when, in April, 1861, he entered the military service—to attempt to supply such want with a work, which, by reason of its extended plan and full presentation of principles and precedents, should constitute, not merely a text book for the army, but a *law book* adapted to the use of lawyers and judges. The present treatise was substantially completed in 1880, when the author was called upon to publish his annotated "Digest of Opinions of the Judge Advocates General," and some of the references embraced in the original work were inserted in the notes of that publication. Since its date certain unusually important military trials and investigations have been had, sundry valuable opinions upon questions of military law have been pronounced by the courts and other legal authorities, and our written military law—especially the Army Regulations—has been materially modified. Meanwhile also, in England, the time-honored Mutiny Act and Articles of War have wholly passed away and been succeeded by the new "Army Act" and "Rules of Procedure,"—a reform of great interest to the military student,—and this legislation, &c., has been copiously illustrated by the excellent official "Manual of Military Law" and a series of minor commentaries.

In view of these changes, the present work has been revised, and in great part re-written, and the references have been brought down to the end of the year 1885. Apart from the views and conclusions of the author, the *precedents*, now first collected and considered, will, it is believed, be found to be valuable both as law and history. A complete history, for example, of the late war could scarcely be written without taking into consideration the more important trials and acts of military government of that period instanced in the course of these volumes.

The author, however, will be fully recompensed for his labors if the same shall result in inspiring an interest in the study of Military Law as a department of legal science not heretofore duly recognized. The lawyer who, if he has not been led into the old error of confounding the military law proper with martial law, has perhaps viewed it as consisting merely of an unimportant and uninteresting scheme of discipline, will, it is hoped, discover in these pages that there is a military code of greater age and dignity and of a more elevated tone than any existing American civil code, as also a military procedure, which, by its freedom from the technical forms and obstructive habits that embarrass and delay the operations of the civil courts, is enabled to result in a summary and efficient administration of justice well worthy of respect and imitation. The military student, on the other hand, in examining the cases cited, as adjudicated by the courts which expound the international law, the common law, the criminal law, and the maritime law, will, it is thought, more fully appreciate the connection between the military law and the general law of the land;—will perceive that the former, while distinct and individual, is not an isolated exception, but a branch of the great body of the public law, variously and harmoniously affiliated with the other branches of the system.

That Military Law, from its early origin and historical associations, its experience of many wars, its moderation in time of peace, its scrupulous regard of honor, its inflexible discipline, its simplicity, and its strength, is fairly entitled to consideration and study, is a belief of the author which he trusts his readers will share.

PREFACE TO THE PRESENT EDITION.

SINCE the publication of the original edition of this Treatise in 1886, the scope of our military law has been enlarged, and its procedure modified, by new legislation of Congress; notable adjudications illustrating military questions have been made by the civil courts, and opinions rendered by the law officers; important military trials have been held; the Army Regulations have been re-codified; and the discretion of courts-martial in the imposition of punishment in cases of enlisted men has been defined and restricted by statutory authority. A new edition of the work, revising the original text and bringing down the law and rulings to the present date, has thus seemed desirable. In preparing it, the subject of the Law of War, which was previously left somewhat incomplete, as a consequence of the author's absence at a station distant from Washington, has been materially supplemented.

Meanwhile there have been published two editions, of 1887 and 1893, (revised in 1895,) of a compendium of the text of this treatise, entitled an "Abridgment of Military Law," which has been adopted by the Secretary of War, and is now used, as the text book on Military Law for the instruction of the Cadets of the Military Academy.

Pari passu with this edition there has been prepared by the author, and recently published, a new annotated edition of the "Digest of the Opinions of the Judge Advocates General of the Army," covering the period from the date of the preceding edition in 1880 to 1895. This work will be frequently referred to in the notes herein.

Since the plates of the present edition have been cast, there has been completed in the War Department a new set of the

Army Regulations, with which, when published, the Regulations mainly referred to in these volumes—those of 1889—may be compared and the new numbers noted. The most material portion of the new Regulations—those relating to COURTS-MARTIAL—have been extracted and are inserted in the Appendix at the end of Volume II.

WASHINGTON, D. C., *November 1, 1895.*

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EXPLANATION OF REFERENCES.

The known military writers, or authors of works on military or naval law or history, are generally cited simply by name—as Bruce, Adye, Sullivan, Grose, Williamson, Tytler, McArthur, Samuel, Delafons, McNaghten, Simmons, Harcourt, Griffiths, Kennedy, Napier, Hughes, Hickman, D'Aguilar, Prendergast, Thring, Tulloch, Franklyn, Gorham, Jones, O'Dowd, Brackenbury, Pratt, Story, Tovey, Worsley, Macomb, Maltby, O'Brien, DeHart, Coppée, Benét, Lee, Harwood, Ives, Birkhimer.

Hough's principal work on Courts-Martial, published in 1825, is referred to as—Hough.

His "Practice of Courts-Martial and other Military Courts," (1834,) as—Hough, (Practice.)

His "Military Law Authorities," (1839,) as—Hough, (A.)

His "Precedents in Military Law," (1855,) as—Hough, (P.)

Clode's "Military Forces of the Crown," (2 vols.,) is referred to as—Clode, 1 (or 2) M. F.

His "Administration of Justice under Military or Martial Law," as—Clode, M. L.

James' "Collection of the Charges, Opinions and Sentences of General Courts-Martial," is referred to as—James.

"A Letter to the Queen on a late Court-Martial," by Samuel Warren, is referred to as—Warren.

The "Rules for the guidance of Courts-Martial in the Bombay Army," is referred to as—Bombay R.

The "Manual of Military Law" by Col. J. K. Pipon and J. F. Collier, Esq., is referred to as—Pipon & Col.

The official "Manual of Military Law," the work of some seven different writers, revised by the Judge Advocate General, and published by the British War Office, Oct. 1st, 1882, is referred to as—Manual.

The French "Manuel Pratique des Tribunaux Militaires," by P. Alla, is referred to as—Alla.

The edition referred to of the Journals of (the Continental) Congress, is that published by Way & Gideon, Washington, 1823.

The Military Dictionaries referred to are specifically indicated as those of Voyle, Duckett, Campbell, Duane, Scott, &c.

The numerous military Trials or Inquiries referred to are chiefly the printed proceedings contained in volumes to be found in the law library at the Capitol, Washington, the libraries of the Executive Departments, and other law or general libraries. Others are to be found, and are cited as published, in the "American Archives" or "State Papers." Of others, which exist only in the original records on file in the Judge Advocate General's Department, the proceedings have generally been published in specified General Orders.

The Orders of the War Department or Headquarters of the Army, [including the earlier O., (A. & I. G. O.,) which were dated but not numbered,] are in general referred to simply as G. O. or G. C. M. O., of such a year, &c., *without adding* "*War Dept.*," *or* "*Hdqrs. of Army.*" They are *thus distinguished* from the G. O. and G. C. M. O. of the military Departments, &c., in citing which the name of the specific Dept., Division, Army, &c., is always given.

The other military work of the present author—the annotated "Digest of Opinions of the Judge Advocates General" is referred to simply as—DIGEST.

MILITARY LAW.

CHAPTER I.

THE SUBJECT DEFINED AND DIVIDED—CONSTITUTIONAL PROVISIONS.

MILITARY LAW, in its ordinary and more restricted sense, is the specific law governing the Army[1] as a separate community.

In a wider sense, it includes also that law, which, operative only in time of war or like emergency, regulates the relations of enemies and authorizes *military government* and *martial law*.

The general subject of Military Law will therefore naturally be presented under two Parts, as follows:

Part I. The Military Law Proper.

Part II. The Law of War.

But a treatise on Military Law can scarcely be complete, or satisfactory to the military profession, without some reference to the *quasi* civil functions which may be devolved upon the army and to the legal relations in which its members may be placed toward the civil community. A further Part has therefore been added to this work, entitled—

---

[1] "The military establishment of this country is divided by the general laws of the United States into the Army and the Navy."—U. S. *v.* Dunn, 120 U. S., 252. Military Law, or the "Law Military," in its most comprehensive sense, may thus be deemed to embrace the law governing the *Navy*. This law, however, it is not proposed to advert to except in so far as its provisions or principles may illustrate those of the law pertaining to the Army, or affect the status of the Marine Corps when serving with the Army. For the distinctive features of our Naval Code, reference may be had to Title XV. of the Revised Statutes, the U. S. Navy Regulations, ed. of 1881, the Gen. Ct. Mar Orders of the Navy Department, which have been issued regularly since February, 1879, and Commodore Harwood's treatise on Naval Courts Martial, published in 1867.

Part III. Civil functions and relations of the Military.

SOURCE OF AND AUTHORITY FOR MILITARY LAW IN GENERAL.

Historically, as will hereafter be indicated, our military law is very considerably older than our Constitution. With the Constitution, however, all our public law began either to exist or to operate anew, and this instrument therefore is in general referred to as the source of the military as well as the other law of the United States. Thus it is said by Chief Justice Chase, in *Ex parte* Milligan:[1]—"The Constitution itself provides for military government as well as for civil government. * * * There is no law for the government of the citizens, the armies, or the navy of the United States, within American jurisdiction, which is not contained in or derived from the Constitution."

Specific Constitutional Provisions. The provisions of the Constitution which may be regarded as the source or sanction of, or authority for, our existing military law and jurisdiction—the discipline of armies as well as the war power—are the following, viz.:

1st. Those by which CONGRESS, as the *Legislative* branch of the government is empowered—"To define and punish * * * offences against the law of nations;" "To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;" "To raise and support armies;" "To provide and maintain a navy;" "To make rules for the government and regulation of the land and naval forces;" "To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;" "To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States;" and further, generally, "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers," (*i. e.* those here recited together with various others set forth in the same section,) "and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof."[1]

---

[1] 4 Wallace, 137.

2d. Those by which the PRESIDENT, as the *Executive* power, is constituted "Commander-in-Chief of the Army and Navy of the United States, and of the Militia of the several States when called into the actual service of the United States;" by which he is empowered to appoint, (generally in conjunction with the Senate,) and is required to commission, the officers of the Army, &c.; and by which it is made his duty to "take care that the laws be faithfully executed."[2]

3d. The provision of the Vth Amendment,[3] that—"No person shall be held to answer for a capital or otherwise infamous crime[4] unless on a presentment or indictment of a Grand Jury, except in actual service in time of war or public danger."[5]

These provisions[6] will be variously applied and illustrated in the several Parts of the work.

---

[1] Const., Art. I., Sec. 8.

[2] Const., Art. II., Secs. 1, 2 and 3.

[3] "This provision in effect says that offences in the land or naval force shall be dealt with according to military law."—Runkle *v.* U. S., 19 Ct. Cl., 397, 410. And see authorities cited in Chapter V, pp. 51, 52, *post.*

[4] That the term "infamous crime," as here used, is now mainly applicable to crime punishable by imprisonment in "a penitentiary or similar institution," see *Ex parte* Wilson, 114 U. S., 417; Mackin *v.* U. S., 117 U. S., 348; *In re* Claasen, 140 U. S., 200, 204.

[5] This Amendment has been very recently construed by the U. S. Supreme Court, in the case of Johnson *v.* Sayre, April 1895, (158 U. S., 109,) in which it was held that the description—"when in actual service in time of war or public danger"—applied not to "the land or naval forces," but to the "militia" only.

[6] With those cited may also be noticed Art. III. of the Amendments prescribing that: "No soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law." The billeting of soldiers, however, is practically unknown in our Army.

CHAPTER II.

PART I—MILITARY LAW PROPER.

THE WRITTEN LAW—ARTICLES OF WAR AND OTHER DISCIPLINARY STATUTES.

Military law proper—Of what it consists. Military law proper is that branch of the public law which is enacted or ordained for the government exclusively of the military state, and is operative equally in peace and in war. We will term it, in general, simply *military law*, in contradistinction to the law administered by the civil tribunals. Like that law, it consists of a Written and an Unwritten law.

The Written military law. This, which comprises much the greater part of the Law to be considered, is made up of:—
I. The statutory Code of Articles of War; II. Other statutory enactments relating to the discipline of the Army; III. The Army Regulations; IV. General and Special Orders.

I. THE ARTICLES OF WAR.

The Articles, or Rules and Articles, of War, are statutory provisions for the enforcement of discipline and administration of criminal justice in the army, enacted by Congress in the exercise of the constitutional power "to make rules for the government and regulation of the land forces." In their origin, however, a majority of these Articles considerably *pre-date* the Constitution, being derived from those adopted by the Continental Congress between 1775 and 1786, which were themselves taken from pre-existing British articles having their inception in remote antiquity

Early Codes. While no written military codes remain from the times of the Greeks or Romans, some of the principal military offences familiar to our present law, as desertion, mutiny, cowardice, the doing of violence to a superior, and the sale or appropriation of arms, were recognized in their armies; and, of the punishments inflicted by them, while a portion, such as decimation, denial of sepulture (in connection with the death penalty), maiming, exposure to the elements, taking of meals standing, &c., have long ceased to be known, others, such as dishonorable discharge, expulsion from the camp, labor on the fortifications, carrying of burdens, and servile or police duty, have come down to our day without substantial modification. Among the early Germans, in the absence of a written law, justice was in general administered summarily by the chief commanders, through the instrumentality of the priests; the principal punishments, besides death, being whipping, forfeiture of horses or cattle, and a civil and military disqualification or dishonoring imposed for such offences as volunteering for a campaign but failing to take the field, losing the shield in battle, and returning alive from a battle where the chief had fallen.

Of the written military laws of Europe the first authentic instance appears to have been those embraced in the Salic code, originally made by the chiefs of the Salians at the beginning of the fifth century, and revised and matured by the successive Frankish kings: other written laws—as those of the Western Goths, the Lombards, the Burgundians and the Bavarians, extending in date to the ninth century, belong to this period. These codes were all civil as well as military, the civil and military jurisdictions being scarcely distinguished and the civil judges being also military commanders in war.[1]

The date of the first French *ordonnance* of military law is given as 1378; the first German *Kriegsartikel* are attributed to 1487. The laws however of the Merovingian and Carlovingian Franks appear to have reached their full development in 1532 in the celebrated penal code of the Emperor Charles V., which has been viewed as the model of the existing military codes of continental Europe. The Articles of War of the Free Netherlands of 1590, republished in 1705; the elaborate Articles of Gustavus Adolphus, framed in 1621; the Regulations of Louis XIV., of 1651 and 1665; the Articles and Regulations of Czar Peter the Great, of 1715; and the Theresian penal code of the Empress Maria Theresa, of 1768, with the later "Norma"—are among the most noted of the systems of European military law which have succeeded the "Carolina."[1] Some of the details of these laws will be hereafter referred to.

---

[1] Among the principal authorities consulted upon the subject of these early military laws are Potters' Archæologia Græca; Smith's Dictionary of Greek and Roman Antiquities; Adam's Roman Antiquities; Vegetius, De Re Militari; Ludovici, Kriegsprocess; Koppmann, Militärstrafgesetzbuch; Von Molitor, Kriegsgerichte und Militärstrafen; Le Faure, Lois Militaires de la France; Foucher, Commentaire sur le Code de la Justice Militaire.

The British Military Code. For nearly two centuries, and till a very recent date, this parent code was made up of—(1) the statute known as the Army Mutiny Act, and (2) the Articles of War.

The Early Articles. The Articles are much older in history than the statute. The earliest articles appear to have been specific military orders or directions issued to the army, for its government, when about to proceed upon an expedition, or from time to time during war.[2] They were commonly ordained directly by the King, by virtue of his royal prerogative, and with the aid and counsel of his peers, especially of the High Constable and Earl Marshall,[3] officials hereafter to be referred to as composing the court of chivalry, viewed by some writers as the proper original of the court-martial in England.[4] Early ordinances of this character are indicated by the authorities as promulgated by Richard I.,[5] Richard II.,[6] Henry V.,[7] Henry VII., and Henry VIII.;[8] these were succeeded by more extended precepts which continued to be put forth by the Crown, or by its authority, till the period of the Rebellion; those of 1629 and 1639 being the most elaborate.[1] In some instances the generals commanding the armies were empowered by the King, by special commission, to make rules and articles of war.[2] Among the last of these was the ordinance issued in 1640 by the Earl of Northumberland as Lord General,[3] which was followed by a similar one (of ninety-six articles under twelve heads,) promulgated in 1642 by the Earl of Essex as commander of the opposing army of parliament and with the sanction of that body.[4]

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[1] The more usual designation of the code of Charles V.; the full description being "Constitutio Carolina Criminalis."

[2] 2 Grose, History of the English Army, 58; Pipon & Col., 14; Clode, M. L., 29, 72. As to the early history of *naval* military law prior to the Act of 13 Chas. II., "which brought the naval usages and ordinances into the form of a statute," see Forsyth, Cases & Opins. of Const. Law, 193-4.

[3] 2 Grose, 58; Adye, 5; Tytler, 38; Samuel, 61; Griffiths, 18

[4] See Chapter V.

[5] 2 Grose, 63; Samuel, 60, 89. And see Appendix.

[6] These "Statutes, Ordinances and Customs" of Richard II. (A. D. 1385), as given by Grose, vol. 2, pp. 64-69, will be found in the Appendix.

[7] These contain "regulations respecting duties, musters, watches and guards," etc. 2 Grose, 70. And see Samuel, 90; Pratt, 3. They will be found printed in the preface to Grose's Antiquities of England and Wales.

[8] 2 Grose, 70; Samuel, 59-63; Pipon & Col., 14.

Just before the dates last mentioned, viz. in 1639, there was published in London[5] the Code of Articles, already referred to, of Gustavus Adolphus, promulgated by him to his army in July, 1621. In reading these (one hundred and sixty-seven in number), it is readily concluded that not a few of the articles of the English codes of a later date were shaped after this model or suggested by its provisions.[6] In some instances, in our own present articles, there are retained quaint forms of expression identical with terms to be found in this early code as translated.

---

[1] Clode, M. L., 9–11. The articles of 1639, as contained in Clode, 1 M. F., 429–440, are ninety in number and arranged under six separate titles.

[2] 2 Grose, 58–59; Samuel, 64; Clode, M. L., 6, 10; also Id., 2 M F., 425, where is given in full the commission of Chas. I to the Earl of Arundel as commander-in-chief, under which were issued the articles of 1639.

[3] 2 Grose, 70: Samuel, 65; Clode, M. L., 10.

[4] 2 Grose, 71; Samuel, 65; Clode, M. L., 84. And see Clode, 1 M. F., 442, where, as also in Pipon & Col., 367, extracts are given from this Code. Clode, (M. L., 10,) referring to these similar sets of articles, adds—"so that both armies, though opposed to each other, were governed by the same military code. On p. 40, (referring to the articles adopted from the British by our Continental Congress,) he observes—"In 1775 the same thing happened in America."

As to the administration of military justice during the period of the Rebellion and the Protectorate, see, further, Pipon & Col., 15–18.

[5] In Ward's Animadversions of Warre, Book Second, pp. 41–54. See the reference to this code in Stevens' Life of Gustavus Adolphus, 129–130.

[6] A large number of English had served, as officers and soldiers, in the armies of Gustavus Adolphus. Scott's Brit. Army, vol. 2, pp. 41–2, 566. As to the influence of his Articles, and of the military law of the Low Countries, in shaping the English code, see Simmons, § 1, and notes.

Subsequently to the Rebellion, articles were put forth, from time to time, by the Crown or under its authority, during the reigns of Charles II. and James II., viz.: the articles of 1662–3, 1666, 1672 ("Prince Rupert's code"), 1685 and 1688;[1] the last being those in force at the period of the English Revolution and at the date of the first Mutiny Act—1 William and Mary, c. 5, of April 3, 1689. With this Act British Military law began to assume a statutory form.

The most important of the early series of Articles are set forth in the Appendix.

The first Mutiny Act, of 1689. The event which induced the adoption of this enactment—the mutiny and substantial desertion of a detachment of troops, mainly Scotch, which adhered to the cause of the Stuarts and, refusing to obey the order of William III. to proceed to Holland, marched northward—is familiar to the student of military law.[2] The offences thus committed were, by the custom of war, punishable with death, but, by the laws of the realm, not always regarded in this particular by the sovereign, this punishment could not be imposed within the kingdom by the executive power in time of peace.[3] Parliament therefore availed itself of the occasion of asserting its exclusive authority to license such punishment by enacting on the date above mentioned a statute providing generally that any officer or soldier who should thereafter excite, cause, or join in a mutiny or sedition in the army, or should desert the service, should be punished with death or such other penalty as a court-martial might adjudge.[4] The existing articles of war were not superseded, nor was the prerogative of the Sovereign to make articles, or to authorize the death penalty for offences committed

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[1] See Appendix.

[2] See 1 McArthur, 22; Adye, 30; Tytler, 102; Samuel, 136; Clode, M. L., 19; Id., 1 M. F., 142, 497; Pratt, 5.

[3] "Attempts were made from time to time, especially during the despotic reigns of the Tudors, to enforce military law under the Prerogative of the Crown in time of peace; but no countenance was afforded to such attempts by the law of England, and commissions for the execution of military law in time of peace issued by Chas. I. in 1625 and the following years gave rise to the declaration in 1627, contained in the Petition of Right, (3 Chas. I., c. 1,) that such an exercise of the Prerogative was contrary to law." Manual of Military Law, 7–8.

[4] The Act is given in full in the Appendix.

abroad, impaired by the Act: its effect was, as to this penalty, to preclude its infliction *at home* for any military offences except those which it designated.[1]

Later, in 1718, the making of Articles by the Crown, to be operative within the Kingdom as well as beyond seas, was expressly authorized by Parliament in the Mutiny Act; and in 1803 it was enacted that both the Act and the Articles should henceforth apply to the army equally at home and abroad. A general statutory sanction was thus given to the Articles, which no longer depended entirely for their authority upon royal prerogative.[2]

The Mutiny Act, initiated as above indicated, was limited in its operation to a term of about seven months, but, soon after its expiration, was renewed for a year. With frequent additions and modifications it has, since, except for a few brief intervals,[3] been, by annual enactment, continued in force until a very recent period. Meanwhile, though originally consisting of but ten sections, it had become so enlarged as to embrace, in 1878, upwards of one hundred. Meanwhile also the Articles of war, always published with the Act, and from time to time revised, had become, at the date mentioned, nearly two hundred in number. The Articles repeated, though in a different form, many of the provisions of the Act, while in others the two were quite distinct. The necessity of constantly comparing the two, and passing from the one to the other in order to ascertain and harmonize the law, was at least inconvenient, and that the body of law thus dissevered was not sooner consolidated and simplified must remain a matter of surprise to the American student.

The Reform of 1879-1881. Army Act and Rules of Procedure. At length, in 1879, after nearly two centuries of existence, the Mutiny Act, (and with it the code of Articles,) was allowed to expire without renewal, and there was substituted for it, on July 24th of that year, a quite new statute—also however intended to be annually renewed—entitled the "Army Discipline and Regulation Act."[1] In a section of this statute the Sovereign was expressly authorized to make not only articles of war but also "Rules of Procedure" for courts-martial, reviewing officers, &c. Rules, (but no Articles,) were made and published accordingly, but, in 1881, both Act, now designated as the "ARMY ACT," (or "Army Annual Act,") and Rules, underwent a full revision. The revised Act, passed August 27, 1881, has been since annually continued in force, (as of April 30th in Great Britain and later dates abroad,) and, with the Revised Rules, (first promulgated, August 29, 1881,) and a few army regulations,[2] constitutes the existing code for the royal military forces.

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[1] Clode, M. L., 22; Pratt, 4. And see Barwis *v.* Keppel, 2 Wilson, 314.

[2] Pratt, 4; Clode, M. L., 22, 25; Id., 1 M. F., 146, 503. And see the full history of the Mutiny Act and Articles, between 1689 and 1879, as given in the Manual, pp. 14–18.

[3] The only considerable interval, according to the authorities, was one of about two years and ten months, *viz.*, from April 10, 1698, to Feb. 20, 1701. Adye, 21; Clode, 1 M. F., 389–391.

The Army Act is not only a substitute for the old Mutiny Act, but it substantially incorporates also the previous Articles of war,[3] and though the King is still empowered to make Articles, yet the fact of such incorporation, in connection with the creation of the Rules of Procedure, will, as observed by a recent writer,[4] "probably render the exercise of this power unnecessary or very rare." There are thus now *no* British Articles of war, nor are there likely to be any for an indefinite period.

The Act and Rules, instead of abridging and simplifying the law, constitute a code considerably more extended than that which they superseded.[5] Whether the elaboration resorted to

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[1] 42 & 43 Victoria, c. 33. This Act superseded also the Marine Mutiny Act. A similar change—it may be noted—had previously taken place in the *naval* code; the naval Articles of War and general laws for the government of the Navy having been "reconstructed and placed on a new footing by the Legislature in the Naval Discipline Act of 1866." Thring, preface and p. 393.

[2] See "The Queen's Regulations and Orders for the Army, 1881," Sec. VI.

[3] The Act is "a consolidation of the Army Mutiny Act and Marine Mutiny Act, the Articles of War, and the Army Enlistment Act of 1870." Jones, 18. And see Graham, p. 5.

[4] Jones, p. 18.

[5] "The effect of the recent legislation has been rather to complicate than to simplify the military code. Some anomalies have been swept away, but with them has also disappeared much of the simplicity which characterized the administration of military law under the Mutiny Act and Articles of War. Not only has the actual punitive code been largely increased in size, but the manner of carrying it out, on the procedure of courts-martial, has become so involved that the regulations concerning it require close attention." Col. Brackenbury, in Preface to Pratt's Military Law.

As the Act and Rules, with their many Forms, take up so much will prove to have been judicious is as yet a question. There are certainly, however, embraced in the new law many excellent provisions, some of which will be hereafter referred to. References will also be made to the admirable "Manual of Military Law," first published by the War Office, October 1, 1882, by which such provisions are illustrated.

The Military Code of the United States. The two main points of difference between the composition of the American military code and that of Great Britain are—1, that we have in our law no "Mutiny," or "Army Annual" Act, or other corresponding legislation; 2, that our Articles of war, though in large part derived from the British, are wholly statutory, having been, from the beginning, enacted by Congress as the legislative power. Of these Articles we now proceed to outline the history.

Early History—Code of 1775. The second Continental Congress, having, early in its session, to wit, on June 14, 1775, "resolved"[1] that a military force should "be immediately raised," to "march and join the army near Boston," proceeded, on the same day, to appoint a committee, consisting of George Washington, Philip Schuyler, Silas Deane, Thomas Cushing, and Joseph Hewes, "to prepare rules and regulations for the government of the Army."[2] On June 28th following, there was reported by the committee, and on June 30th adopted by Congress, a set of Articles, prefaced by a preamble reciting the causes which had induced the Colonies to assume a defensive attitude and raise an armed force—"for the due regulating and well ordering of which," it is declared, "the following rules and orders are established."[3]

Of this code, comprising sixty-nine articles, the original was

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space, they are not reproduced in this Edition. They will be found published, with copious explanatory notes, in the authorized MANUAL OF MILITARY LAW.

[1] 1 Journals of Congress, 82. The enactments of Congress prior to the adoption of the Constitution were in the form of Resolutions.

[2] 1 Jour. Cong., 83. Of this committee, Washington was, on June 15th, chosen general of the army, and Schuyler, on June 19th, a major-general. 1 Jour. Cong., 83, 86.

[3] 1 Jour. Cong., 90. These Articles, with the subsequent codes, are given in the Appendix.

the existing British code in force in the "ministerial army."[1] Many, however, of the articles were, with slight modifications, copied *directly* from the intermediate MASSACHUSETTS ARTICLES of the preceding April, which may be said to have constituted the first American written code of military laws.[2]

The Articles of War thus inaugurated were, by a Resolution of the same Congress, of November 7, 1775,[3] amended and added to by sixteen further provisions intended to complete the original draft in certain particulars in which it was imperfect.[4] In the meantime a provision, which was in fact a separate Article, and is still traceable in our code, relating to precedence in command between officers of the continental and provincial establishments and of the militia, had been adopted, on November 4th.

Code of 1776. The Articles of 1775 did not remain long in force. On June 14th of the following year it was *resolved* by Congress that "the committee on spies be directed to revise the rules and articles of war;"[5] this being a committee of five, consisting of John Adams, Thomas Jefferson, John Rutledge, James Wilson and R. R. Livingston, which had been previously appointed "to consider what is proper to be done with persons giving intelligence to the enemy or supplying them with provisions."[6] New articles prepared by this committee were reported on August 7th following, and the same were agreed to by Congress on September 20, 1776.[1]

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[1] These British Articles, as copied from the original publication in possession of the Massachusetts Historical Society, are set forth in the Appendix. The fact that the two opposing armies were, at this period, governed by similar codes, has already been noticed.

[2] These articles, (inserted in the Appendix,) were adopted on April 5th, 1775, by the Provisional Congress of Massachusetts Bay, for the observance of its own troops. (Am. Archives, Fourth Series, vol. I., p. 1350.) They were followed by similar articles adopted, in May and June of the same year, successively, by the Provincial Assemblies of Connecticut and Rhode Island, and the Congress of New Hampshire, (Id., vol. II., pp. 565, 1153, 1180;) in April, 1776, by the Pennsylvania Assembly, (Id., vol. V., p. 705,) and later, apparently, (see 1 Jour. Cong., 423,) by the Convention of South Carolina—for the government of their respective levies.

[3] 1 Jour. Cong., 97, 167.

[4] See Appendix.

[5] 1 Jour. Cong., 374.

[6] 1 Jour. Cong., 365. See Works of John Adams, vol. III., p. 83, as to his part in procuring the enactment of these Articles.

Meanwhile, however, there had been adopted on June 17, 1776, a provision "that no officer suttle or sell to the soldiers," under pain of fine and dismissal by sentence of court-martial.[2] And, further, on August 21st, an article providing for the punishment of spies, whose crime was made capital.[3]

The code of 1776, which was an enlargement, with modifications, of that of 1775, was also a complete re-casting of the same; the articles being assembled, (according to the form of arrangement of the British articles,) under separate Sections, each comprising the provisions relating to some specific or general subject.[4]

Amendments of 1786, &c. The Articles of 1776 continued in force till after the date of the adoption of the Constitution; meanwhile, however, undergoing certain very considerable amendments. The most important of these was the last, that of May 31, 1786, by which Section XIV. of the existing code, with "such other articles as related to the holding of courts-martial and the confirmation of the sentences thereof," was repealed and a new Section, entitled "ADMINISTRATION OF JUSTICE," consisting of twenty-seven articles, was substituted.[5] The occasion of this Amendment, as expressed in the preamble of the Resolution of Congress, was the fact that the pre-existing Articles failed to make adequate provision for the trial of offenders "serving with small detachments," those articles requiring that a general court-martial should consist of thirteen members, and a regimental or garrison court of five members: in the new section the number of the inferior court was fixed at three, and the minimum of the general court at five—limitations which have subsisted to the present time.[1]

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[1] 1 Jour. Cong., 435, 482. The Articles are set forth in the Appendix.

[2] 1 Jour. Cong., 377.

[3] 1 Jour. Cong., 450. The resolution enacting this article was *ordered* to be "printed at the end of the rules and articles of war"—where indeed a corresponding provision has ever since remained.

[4] This arrangement was abandoned in the Code of 1806, and has not since been resumed. The material differences between the articles of 1775 and 1776 will be indicated when we come to treat of the present Articles separately.

[5] 4 Journals, 649. See Appendix.

Between the dates of the code of 1776 and the important Amendments of 1786 there were enacted various other articles of war or provisions in the nature of such articles, the greater part of which, however, were but temporary in their operation. Those which are material to be considered in connection with the study of the specific articles of the present code will be hereafter noted.

Later history—Code of 1806. After the adoption of the Constitution, the Articles in force at that date were, by the First Congress, in an enactment of September 29, 1789, (and see, to a similar effect, the Act of May 26, 1790, s. 13,) expressly recognized and made to apply to the existing army. They were subsequently, (with some additions,) continued in operation, by the successive statutes by which provision was made for increasing the army,[2] until the inauguration of a new code by the Act of April 10, 1806.

The Articles of 1806, which superseded all other enactments on the same subjects,[3] were adopted by Congress mainly for the reason that the changed form of government rendered desirable a complete revision of the code.[4] These Articles—one hundred and one in number, with an additional provision relating to the punishment of spies—remained in force, (except as amended,) for nearly seventy years, or till the enactment of the revised code of 1874. During this long interval the military statute law underwent but few changes prior to the commencement of the late war. After that date the alterations and additions were much more numerous. But a comparatively small proportion, however, of these modifications were permanent.

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[1] The Articles of '86, however, amended the existing code in various particulars other than those indicated in the *preamble*.

[2] See Acts of April 30, 1790, s. 3; March 3, 1791, s. 3, 10; March 5, 1792, s. 11, May 9, 1794, s. 4; March 3, 1795, s. 14; May 30, 1796, s. 20; April 27, 1798, s. 2; May 28, 1798, s. 2; July 16, 1798, s. 8; March 2, 1799, c. 27, s. 8; March 2, 1799, c. 31, s. 3; March 16, 1802, s. 10; Feb. 28, 1803, s. 3. In the Acts of 1790, 1795 and 1796, it is added—"so far as the same" (the existing articles) "are applicable to the Constitution of the United States."

[3] Mills *v.* Martin, 19 Johns., 23.

[4] See remarks of Mr. Varnum of the House of Representatives. Annals of Cong., 9th Cong., 1st Ses., p. 264; also O'Brien, 335.

Code and Revision of 1874. The Code of 1874,—that at present in force,—consisting of one hundred and twenty-eight articles, with a supplementary provision relating to the trial and punishment of spies, is embraced in Sections 1342 and 1343 of the Revised Statutes of the United States,[1] being Chapter Five of Title XIV, "THE ARMY."

All the codes which have been enumerated are set forth in the Appendix.

Modifications of the last Code. Since the taking effect of the Code of 1874, but few modifications of the Articles have been enacted. Those which have been amended, (with the nature of the amendment,) are as follows:—Art. 17, (in doing away with the penalty of stoppage, and leaving the punishment to the discretion of the court;) Arts. 38 and 98, (in prohibiting the punishments of flogging, branding, marking and tattooing;) Art. 72, (in extending the authority to convene general courts-martial to colonels commanding departments;) Art. 84, (in slightly modifying the terms of the oath to be taken by members of courts martial;) Art. 103, (in prescribing a separate rule of limitation of prosecutions for desertion in time of peace;) Arts. 104 and 110, (in causing them to specify more intelligibly the act of approval necessary to the execution of sentences;) and all the Articles which leave the punishment of the offence to the discretion of the court, by providing, (Act of September 27, 1890,) that such punishment "shall not, in time of peace, be in excess of a limit which the President may prescribe." Such *other* changes as, in the opinion of the author, may well be made in the present Articles are indicated at the end of Chapter XXV. Our military code, however, stands alone among our public statutes in its retaining many provisions and forms of expression dating back from two hundred to five hundred years, and while it is desirable that some of the Articles should be made more precise or extended in scope, and the code itself be simplified by dropping a few Articles and consolidating others, any radical remodeling which would divest this time-honored body of law of its historical associations and interest would be greatly to be deprecated.

Our existing code of Articles, consisting of the revision of 1874 and subsequent amendments, is contained in the Appendix. In subsequent parts of this work, these Articles will be separately reviewed, and their relations to the provisions of other existing statutes, as well as to those of the earlier sets of articles, be remarked upon.

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[1] As to what are the Revised Statutes, see Chapter XVIII.—Legislative Acts and acts of State."

II. OTHER STATUTORY ENACTMENTS RELATING TO THE DISCIPLINE OF THE ARMY.

The second of the components of the WRITTEN MILITARY LAW consists of those of the public statutes which concern the government or discipline of the military service but are not included in the existing code of Articles, although some of them indeed might well be classed as articles of war.

The statutes here intended are those relating to such subjects as—the authority of the Superintendent of the Military Academy to convene general courts-martial and execute their sentences; the jurisdiction of courts-martial over militia, marines, cadets, retired officers and convicts at the Military Prison; the trial and punishment of officers or soldiers aiding or allowing the escape of convicts; the authority of judge advocates to issue process of attachment of witnesses, to appoint reporters, to administer oaths, and to be present in court; the competency of accused persons as witnesses; the revision of the proceedings and disposition of the records of military courts; the restoration of dismissed officers; the dropping of officers for desertion; the trial by court-martial of officers dismissed by order; the composition of courts-martial for the trial of militia; the forfeiture of civil rights incurred by deserters; the military relations of post traders; the fixing of maximum punishments; the institution of summary courts; the jurisdiction of courts-martial in cases of fraudulent enlistment, etc.[1] These various statutes (which will be found in the Appendix) will hereafter be recurred to, and construed or otherwise considered under the appropriate heads.

A further class of enactments, authorizing or restricting the employment of the army for civil or *quasi* civil purposes, will be reserved for consideration in Part III of this treatise.

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[1] See Rev. Sts., Secs. 1202, 1203, 1228, 1229, 1230, 1256, 1320, 1326, 1359, 1360, 1361, 1621, 1644, 1658, 1996–1998, 5306, 5313; and Acts of June 23, 1874, c. 458, s. 2; July 24, 1876, c. 226, s. 3; March 3, 1877, c. 102, s. 1; March 16, 1878, c. 37; April 11, 1890, c. 78; Sept. 27, 1890, c. 998; Oct. 1, 1890, c. 1259; July 27, 1892, c. 272.

CHAPTER III.

ARMY REGULATIONS AND ORDERS.

ARMY REGULATIONS.

IN passing from Articles of war to Army Regulations, we pass from the province of one department of the government to that of another—from legislative statutes to executive acts. The subject will be treated under the following heads: I. Regulations in general; II. Regulations for the Army; III. Principles governing regulations; IV. Special sets of Regulations.

I. REGULATIONS IN GENERAL.

Their Classification—Express Authority for Regulations. While all law is regulation in a greater or less degree, *regulations* proper, whether army regulations or other, are administrative rules or directions as contrasted with enactments. The word "regulation" or "regulations," (as also the allied term "rules,") is employed sometimes in the Constitution[1] as descriptive of *statute law*, and this use has proved confusing to the student. A similar designation occurs in certain, especially of the earlier public Acts, though it is not frequent. As a general practice, Congress, in framing a public law in which provision is made for an elaborated system, a measure of policy, or other extended subject or project, of which the execution involves minor details of performance, disposes of such details in one of *three* forms.[2] It either goes on itself to prescribe rules, general or specific, for such performance; or it authorizes some public officer to make proper rules for the purpose; or it is entirely silent on the subject, prescribing no regulations itself and devolving no authority, in terms, upon any official. The rules of the *first* class are

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[1] In Art. I., Sec. 4 § 1; Id., Sec. 8 § 11, 14; Art. 4, Sec. 3 § 2.

[2] See McCall's case, as cited in note, *post*.

statutes: those of the *second* class *regulations* as distinguished from statutes, and bearing a relation to statutes similar to that which the latter bear to constitutional provisions. The *third* class, in which are included army regulations, will be considered presently. The *first* form—where *specific* regulations are set forth—is comparatively rare,[1] for the reason that the Legislature can seldom foresee all the details that may require to be regulated in the course of the execution of a statute.[2] Of the *second* form the instances are frequent, and this is the form ordinarily adopted in enactments relating to complex subjects. Thus, by Sec. 161 of the Revised Statutes, the heads of the executive departments are authorized by Congress "to prescribe regulations not inconsistent with law" for the internal government of their departments, the conduct of the business, and the custody and use of the records and public property in their charge. So, in a multitude of other important statutes, Congress, in imposing or conferring some special charge or capacity, or in legislating generally upon some matter the particulars of which fall within the executive province, has specifically authorized or directed the proper executive officer—the President, or head of department, or, in some cases, inferior official—to make regulations for the proper discharging of the function, or the carrying out of the details of the subject.[3] These regulations, indeed, numerous and multifarious as they are, represent the exercise of a very considerable power on the part of our public functionaries, and serve a purpose in the efficient administration of our Government not readily or commonly appreciated.[1]

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[1] Conspicuous instances of specific regulations prescribed in statutes are found in the early Acts of March 23, 1792, c. 11, s. 2; March 3, 1803, c. 37, s. 1; April 10, 1806, c. 25, s. 2 and J. R. 14 of July 23, 1846; also in Act of April 29, 1864, c. 69, s. 1, (Sec. 4233, Rev. Sts.;) in Sec. 337, Rev. Sts., and in the recent Acts of March 3, 1879, c. 195; Aug. 2, 1882, c. 374; March 3, 1885, c. 354, and Aug. 19, 1890, c. 802.

[2] Boody *v.* U. S., 1 Wood & Minot, 164; U. S. *v.* Webster, Daveis, 38.

[3] It would require too much space to enumerate all the statutory provisions of this class down to the present time, in which "regulations," as such, are authorized to be prescribed. For the principal of those enacted prior to 1886, reference may be had to the first edition of this work, page 18–19, note 3. Repeated instances also occur in the statutes where, though the word "regulations" is not employed, the same meaning is conveyed by some equivalent term or expression; as by the term "directions," "instructions," "forms," "requirements," "restrictions," "conditions," "limitations," "by-laws." Not unfrequently a thing is required by the statute to be done in such manner, etc., as a head of a Department, etc., "may prescribe." The "Regulations for the Government of the Revenue Cutter Service of the United States," issued by the Secretary of the Treasury, April 4, 1894, and resting on no authority more express than is found in the terms

Implied Authority—The Third Class of Regulations. But Congress is incapable of delegating any portion of the legislative power, and the giving, in a statute, of authority to an executive official, to make regulations for executing the same, is, in general, quite unnecessary, amounting to no more than an indication, on the part of Congress, of a purpose to leave the details of execution where in fact they properly belong, with a suggestion, sometimes, as to the particulars especially to be regulated. Thus, in the cases of a great majority of the statutes of the second class, an authority in the Executive to make regulations would legally have been *implied* without any express grant to that effect. So, there are many statutes of the *third* class—those in which Congress is silent as to the matter of the execution of the details—in which such an authority results by a legal implication from the terms or subject of the enactment, considered in connection with the inherent function of the Executive.[2] The Constitution devolves it upon the executive department to "take care that the laws be faithfully executed." In a case, therefore, of a law of which the execution requires to be specifically methodized, it is the duty of that department, and it is authorized, in the absence of any *ex-*

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of Secs. 2758 and 2762 placing this corps (consisting of the officers and crews of thirty-six vessels) under the general direction of the Secretary, is a striking illustration of the discretion exercised by heads of Departments in making regulations as to matters of detail.

The point may be noted here that regulations duly framed under a statute may sometimes well be referred to as a practical interpretation of the statute itself. See U. S. *v.* Cottingham, 1 Rob., (Va.,) 635.

[1] "All the law of the United States is not specifically expressed in statutory enactments. Many powers are necessarily inherent in the various departments of the government without which the government could not perform functions necessary to its existence. The exercise of such powers is nevertheless in pursuance of the laws of the United States." *In re* Neagle, 39 Fed., 834.

[2] "When statutes confer powers, impose duties, and provide for the accomplishment of various objects, they are necessarily couched in general terms, but they carry with them, by implication, all the powers, duties and exemptions necessary to accomplish the objects thereby sought to be attained." *In re* Neagle, *ante.*

press authority for the purpose, to prescribe the rules or directions necessary and proper to effectuate the object of the statute;[1] care of course being taken that the regulations shall not partake of the nature of legislation. This inherent authority of the Executive—the President, or head of a Department acting for and representing him—has been repeatedly noticed and affirmed by the authorities.[2]

II. REGULATIONS FOR THE ARMY.

Their Original Source and Authority. The authority for army regulations proper is to be sought—primarily—in the distinctive functions of the President as Commander-in-chief and as Executive. His function as Commander-in-chief authorizes him to issue, personally or through his military subordinates,[3] such orders and directions as are necessary and proper to ensure order and discipline in the army. His function as Executive empowers him, personally or through the Secretary of War,[4] to prescribe rules, where requisite, for the due execution of the statutes relating to the military establishment. The *former* description of regulations scarcely differ from some of the Orders which remain to be separately noticed except in that they are of a more permanent character. Often indeed originally initiated as *orders* merely, they have become regulations by being incorporated as such in the authorized publications.[1] Those of the *latter* species are more strictly "regulations," being especially within the description of rules "in aid or complement of statutes."[2]

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[1] A recent instance of Army regulations instituted for the purpose of executing the intent of a statute in which no authority for regulations is conveyed in terms, is that of the regulations published in G. O. 55 of 1885, for effectuating the provisions of the Act of Feb. 14, 1885, entitling enlisted men to be placed upon the retired list.

[2] "Of course Congress cannot constitutionally delegate to the President legislative powers; but it may in conferring powers constitutionally exercisable by him, prescribe, or omit prescribing, special rules of their administration, or may specially authorize him to make the rules. When Congress neither prescribes them, nor expressly authorizes him to make them, he has the authority, inherent in the powers conferred, of making regulations necessarily incidental to their exercise, and of choosing between legitimate alternative modes of their exercise." McCall's Case, 2 Philad., 269. And see Wayman *v.* Southard, 10 Wheaton, 42, 43; U. S. *v.* Macdaniel, 7 Peters, 2; U. S. *v.* Bailey, 9 Id., 238; Lockington *v.* Smith, 1 Peters, C. C., 471; Boody *v.* U. S., 1 W. & M., 164; *In re* Spangler, 11 Mich., 298; *In re* Griner, 16 Wis., 423; Antrim's Case, 5 Philad., 287; Allen *v.* Colby, 47 N. H., 544; Cooley, Prins. Const. Law, 44; 1 Opins. At. Gen., 478; 2 Id., 225, 243–5, 421; 4 Id., 225, 227; 6 Id., 365.

[3] That military commanders, in giving legal orders, represent the Commander-in-chief, the President, see Clark *v.* Dick, 1 Dillon, 8; Lockington's Case, Brightly, 289; O'Brien, 30.

[4] That army regulations duly issued by the Secretary of War are in law the acts and regulations of the President as Executive or Commander-in-chief, see U. S. *v.* Eliason, 16 Peters, 301; Do. *v.* Webster, Daveis, 59; Do. *v.* Freeman, 1 Wood & Minot, 50–1; Lockington's Case, Brightly, 288; McCall's Case, 5 Philad., 269; *In re* Spangler, 11 Mich., 322; Cooley's note to 2 Story, Const. Law, 314; Flanders, Expos. of Const., 169; 5 Opins. At. Gen., 39.

From these two sources is derived an original and sufficient authority for Army Regulations in general, no authority or sanction on the part of Congress being required. Congress, however, has repeatedly conferred such authority in express terms where *general* regulations for the Army were to be issued, and has sometimes also reserved to itself a right of approval or supervision of the same when made. For *special* regulations also it has frequently given an express authority.

Regulations as authorized or affected by Legislation—The successive Publications of Regulations. The action of Congress on the subject of general army regulations, subsequently to the adoption of the Constitution,[3] may be said to have commenced with the Act of March 3, 1813, c. 52, s. 5,[1] in which the Secretary of War was authorized and required "*to prepare general regulations better defining and prescribing the respective duties and powers of the several officers in the adjutant general, inspector general, quartermaster general, and commissary of ordnance departments, of the topographical engineers, of the aids of generals, and generally of the general and regimental staff; which regulations,*"—it was added—"*when approved by the President of the United States, shall be respected and obeyed until altered or revoked by the same authority. And the said general regulations, thus prepared and approved, shall be laid before Congress at their next session.*"

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[1] See Maddux *v.* U. S., 20 Ct. Cl., 198.

[2] 8 Opins. At. Gen., 343; In the matter of Smith, 23 Ct. Cl., 460.

[3] Prior to the adoption of the Constitution, Congress, (which then constituted the government,) provided from time to time for regulations for the army, principally for the government of the staff corps. In some cases the Board of War, then consisting of civilians, was directed to make regulations. (2 Journals of Congress, 432, 520; 3 Id., 328.) In others, chiefs of the different corps were so authorized; as the Quartermaster General, for certain classes of his employes (Id., 126; 3 Id., 253, 496); the Inspector General, (3 Id., 203, 523, 525;) the Director of Military Hospitals, (Id., 527;) and the Medical Board, (Id., 705.) The Secretary of War, after one was appointed by Congress, was, in addition to his general duties, required to "regulate," or "direct," as to certain special subjects—as the making of payments and returns and keeping of accounts by regimental paymasters, (4 Journals, 7,) the making and transmitting of returns by officers generally, (Id., 9,) and the duties of the commissary general of prisoners. (Id.) On March 29, 1779, Major General (Baron) Steuben's "System of Regulations for the Infantry of the United States," a work consisting mainly of tactics and instructions for field service, was adopted and ordered to be observed in the army. (3 Id., 237.) As to the publications of these and other early regulations and orders, see further in Gen. J. B. Fry's Pamphlet on "The Different Editions of Army Regulations," New York, April 10, 1876.

Under this statute there was published a brief manual of regulations of some sixty duodecimo pages—the original of the compend now in use—bearing the endorsement: "Approved by the President, War Office, 1st May, 1813." These regulations were laid before Congress on June 7, 1813, but no legislative action was taken upon them.[2]

The next statute[3] of general importance was that of April 24, 1816, c. 69, ("for organizing the general staff," &c.,) by which, in section 9, it was enacted "*that the regulations in force before the reduction of the army,*" (referring to the Act of March 3, 1815, "fixing the military peace establishment," after the war with Great Britain,) "*be recognized, as far as the same shall be found applicable to the service, subject however to such alterations as the Secretary of War may adopt with the approbation of the President.*"[4]

In view of the authority thus given for additions and amendments, there was published a second and more extended set of regulations, (embracing amplified regulations for the ordnance corps,) dated "September, 1816." These were published with additions in 1817 and 1820; and on March 2, 1821, in section 14 or chapter 13 of the Acts of that year, a revision by Gen. Scott, of the existing regulations, received the formal sanction of Congress by enactment as follows:—"*that the system of 'general regulations for the army,' compiled by Major General Scott, shall be, and the same is, hereby approved and adopted for the government of the army of the United States, and of the militia when in the service of the United States.*" In the next year, however, (1822,) by Act of May 7th, c. 88, the section of 1821 was expressly "repealed;" the grounds for this action mainly being that the regulations as adopted operated with injustice in the provision authorizing the transfer of officers, and also in that relating to brevet rank. Neither of these provisions has, to the present time, been repeated in the regulations of the army.

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[1] For *prior* legislation of inferior and temporary importance the student is referred to the Acts of May 9, 1794, c. 24, s. 5; March 2, 1799, c. 27, s. 5; Jan. 2, 1812, c. 11, s. 1; July 6, 1812, c. 128; March 3, 1813, c. 48, s. 5. The provision of March 19, 1802, relating to Regulations for the Military Academy, will be hereafter separately noticed.

[2] Annals of Congress for 1813, pp. 23, 144.

[3] The intermediate Act of Feb. 8, 1815, c. 38, s. 4, 10, provided specially for regulations for the ordnance department.

[4] In s. 7 of this Act it was further provided "*that the manner of issuing and accounting for clothing shall be established in the general regulations of the War Department.*"

The regulations approved in 1821 were first published to the army in "July, 1821," when they were prefaced by an order of the Secretary of War, which recited that they had been approved by Congress, with the exception of fourteen, (indicated by their numbers,) which had "received the sanction of the President." These regulations, notwithstanding the legislation of 1822, continued to be observed till March 1, 1825, when an enlarged edition was published to the army. This, with some modifications, remained in force till September 1, 1835, at which date a revision by Major General Macomb was printed by authority of the War Department, which was re-issued with amendments on December 31, 1836. Further on, January 25, 1841, May 1, 1847, January 1, 1857, and August 10, 1861, successive revisions, containing additions and variations were promulgated; each publication exhibiting an introductory announcement to the effect that the regulations thus revised had been approved by the President and were

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[1] Annals of Congress for 1822, pp. 1730–1734, 1753–1758, 1868. And see Gen. Fry's Pamphlet, (above cited,) p. 4.

[2] They were so observed because of the previous sanction of the President, (under the Act of 1816,) which sanction was held by Atty. Gen. Wirt to have given them an efficacy not affected by the legislation of 1822. 1 Opins., 547. And see G. O., War Dept., May 22, 1822, in which, in stating the fact of the repeal of the provision of 1821 by that of 1822, it is announced that—"the General Regulations for the Army" thus "rest solely on the sanction of the President. The said Regulations are, therefore, continued in force by his authority in all cases where they do not conflict with positive legislation."

by his command published "for the information and government of the military service," to be from their date "strictly observed as the sole and standing authority upon the matter therein contained." And it is added, in the more recent issues,—"nothing contrary to the tenor of these regulations will be enjoined in any part of the forces of the United States by any commander whatever." There vision of 1861 was republished as of June 25, 1863, and this last edition remained in use during the latter portion of the late war and subsequently till the year 1881.

Until the year 1866, the enactments of 1813 and 1816 continued to constitute the main legislative authority and sanction for the making and amending[1] of general army regulations; these enactments indeed being from time to time supplemented by special statutory provisions relating to particular branches of the service.[2]

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[1] The power to amend the existing regulations, as conveyed by the Act of 1816, was repeatedly recognized by the authorities during this interval. Thus Atty.-Gen. Wirt, in an opinion addressed to the Secretary of War in 1821, observes:—"I have no doubt that the Secretary may, with the approbation of the President, alter at pleasure the existing regulations, * * * even although such alteration should go to an entire change of the present system; provided that such regulations, as proposed to be altered, be consistent with the Constitution and laws of the United States." 1 Opins., 470. And see, to a similar effect, 1 Id., 549; 3 Id., 85. Later, Atty.-Gen. Cushing, referring to the enactment of 1816 as a "permanent provision" for army regulations, remarks that—"under this authority it is that the subsisting" (1853) "regulations for the army have legal effect." 6 Opins., 15. That the Act of 1816 authorized the Executive to alter at discretion the regulations recognized by it as in force, is also held by a United States Court in U. S. *v.* Maurice, 2 Brock., 105. And compare, as to the authority to alter the regulations for the *Navy*, given by the Act of July 14, 1862 (Sec. 1547, R. S.), the opinion of Atty.-Gen. Bates in 10 Opins., 416.

It may be noted that the army regulations during this interval received indirect sanction from repeated statutes referring to them in general terms as the "existing regulations," or referring to the particular regulations relating to a certain subject, as transportation, forage, clothing, extra pay, etc., and also from a series of appropriation Acts in which appropriation was made for the "printing" of the same. In Maddux *v.* U. S., 20 Ct Cl., 198, the Court say:—"When Congress permit regulations to be formulated and published and carried into effect year after year, the legislative ratification must be implied."

[2] Many of these provisions are given in the First Edition, p. 24, note. It is not thought worth while to reproduce them here.

Of the special regulations of this period the most extended and important were those which proceeded from the Provost Marshal Gen-

Later Legislation. In 1866, by the Act of July 28th, c. 299, "fixing the military peace establishment" at the end of the war, the Secretary of War was "*directed to have prepared, and to report to Congress, at its next session, a code of regulations for the government of the army and of the militia in actual service, which shall embrace all necessary orders and forms of a general character for the performance of all duties incumbent on officers and men in the military service, including rules for the government of courts-martial. The existing regulations to remain in force until Congress shall have acted on said report.*" Here the general regulations in use in the army were, as a whole, for the first time since 1821, formally approved and recognized by Congress, and, for the first time since 1816, (when however *new* regulations were authorized only as "alterations" of those existing,) provision was made for a new issue. No regulations, however, were reported to Congress under this Act, or till after the passage of the Act next to be mentioned.

Later, in 1870,[1] by s. 20, c. 294, Act of July 15, the legislation of 1866 was, so far as regards the provision for new regulations, substantially superseded by an enactment—"*that the Secretary of War shall prepare a system of general regulations for the administration of the affairs of the army, which, when approved by Congress, shall be in force and obeyed until altered or revoked by the same authority; and said regulations shall be reported to Congress at its next session.*" In compliance with this statute, a complete set of army regulations was reported to Congress by the Secretary of War, on February 17, 1873.[2]

No determinate action, however, was taken upon these regula-

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eral's Bureau, with the approval of the Secretary of War, under the Act of 1863 above cited. A set of these, first issued on April 21, 1863, was revised aad republished with additions on May 1, 1864, and again on Sept. 1, 1864.

The Act of March 3, 1851, c. 25, s. 2, 9, providing for regulations for the Military Asylum, (now Soldiers' Home,) not noted above, will be referred to hereafter.

[1] Meanwhile special regulations relating to military subjects were authorized by several statutes of which the following are still in force:—Act of July 28, 1866, c. 299, s. 17, (Rev. Sts., Sec. 1180, as to hospital stewards;) J. R. of May 4, 1870, (Id., Sec. 1225, as to issue of arms, &c., for colleges;) Act of June 17, 1870, c. 132, s. 1, (Id., Sec. 4787, as to artificial limbs, &c., for disabled soldiers.)

[2] These regulations are printed in Report, No. 85, Ho. of Reps., 42d Cong., 3d Sess.

tions by Congress; but, in 1875, by Act of March 1, c. 115, (still in force,) the requirement of the section of 1870, that the regulations be reported to and approved by Congress, was "repealed," and the President was specifically "*authorized under said section to make and publish regulations for the government of the army in accordance with existing laws.*" Here Congress relinquished the right, which it had repeatedly reserved in previous statutes, of ratifying, or at least supervising, the regulations, and surrendered to the Executive the fullest control over the subject. For not only is the President hereby empowered to make regulations without restriction as to form, quantity or quality, but also without limitation as to time. He thus has the power to re-make and alter, in the future[1]—a power expressly given by the Act of 1816 and exercised thereunder till 1866, divested apparently by the legislation of the latter year,[2] reserved to Congress by the Act of 1870, but now fully restored.

In the next year, (1876,) however, by a Joint Resolution of August 15, Congress "requested" the President "*to postpone all action in connection with the publication of said regulations until after the report*" of the Commission on the reform and reorganization of the army, created by Act of July 24, 1876, was "*received and acted upon by Congress at its next session.*"

Upon the "report" here indicated no final action was ever taken, and the said Commission was, after March 4, 1879, discontinued. Thereupon, by Act of June 23d of that year,[3] the Secretary of War was "*authorized and directed to cause all the regulations of the army and general orders now in force to be codified*

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[1] In U. S. *v.* Eliason, 16 Peters, 301–2, the Supreme Court, referring to the general power of the Executive to establish regulations for the government of the army, say:—"The power to establish implies, necessarily, the power to modify or repeal, or to create anew." And see 3 Opins., 63; 5 Id., 41.

[2] See 14 Opins., 173. The view, however, expressed by the Atty. Gen., in his opinion, as to amendments, was not followed by the Secretary of War; repeated amendments being made and published in Orders between 1866 and 1875.

[3] Meanwhile—since 1870—had intervened the Act of Aug. 15, 1876, c. 300, authorizing regulations as to the furnishing of artificial limbs in certain cases, and the Acts of March 3, 1873, c. 249, s. 2, and April 10, 1878, c. 58, to be hereafter referred to, providing for regulations for the Military Prison and for the preparation, &c., of bids for contracts.

and published to the army, and to defray the expenses thereof out of the contingent fund of the army."

The present Army Regulations. Upon this legislation, which was in effect an appropriation for the expense of carrying out the enactment of 1875, a compilation of regulations and general orders, in force February 17, 1881, was made and published to the army by the Secretary of War as of that date. The authority to *modify* began soon to be resorted to, and was presently most freely exercised. The result was a multitude of amendments, additions and revocations, announced in successive General Orders.[1]

These modifications became in a few years so numerous and confusing as to make necessary a further revision. This revision, published February 9, 1889, constitutes (with the amendments since made, for the modifying practice still goes on[2]) the existing Regulations for the Army upon the subjects embraced. They have been repeatedly impliedly sanctioned in Acts of Congress since that date.[3]

Legal Effect and Force of Army Regulations. We have seen that Congress, in the existing law, no longer reserves to itself the function of approving the army regulations, or makes its approval of the same a condition to their taking effect, but that, under the Act of 1875 above cited, the President is vested with a general and exclusive authority to make and publish regulations for the army. As has heretofore been remarked, he may, in the due execution of the laws for the government of the army, make needful and proper regulations without any legislative authority whatever, similarly as he may give orders as commander-in-chief. A statutory authority for general army regulations is indeed mainly useful and significant as a justification of such expenses as it may be necessary from time to time to incur in the publication of the regulations, since it implies that the requisite appropriation for the same will be made by Congress.

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[1] These Orders were about three hundred and fifty in number. Many of them contained amendments of more than one, often of several, regulations. Certain regulations were amended not once but several times in successive Orders.

[2] Some two hundred Orders have since been issued, publishing modifications of these regulations.

[3] Mostly in the Army Appropriation Acts. See 25 Stats. at Large, 968; 26 Do., 154, 399, 777, 820, 874; 27 Do., 181, 484.

[October 1, 1895. It is understood that a *new* set of Army Regulations is in preparation and soon to be published.]

But, whether or not resting upon any express authority of statute, the *legal effect* of army regulations—as of other regulations proper—is, as already indicated, simply that of executive, administrative, instrumental rules and directions as distinguished from statutory enactment.[1] It is indeed somewhat loosely said of the army regulations by some of the authorities[2] that they have "the force of law," but this expression is well explained by the court in U. S. *v.* Webster,[3] as follows:—"When it is said that they have the force of law, nothing more is meant than that they have that virtue when they are consistent with the laws established by the Legislature." That is to say, while they have a legal force, it is a force quite distinct from, and inferior and subordinate to, that of the statute law. They have the force of law within their proper scope, not beyond it.[4] They are thus not law in the sense of being a part of the "law of the land," nor are they embraced in the designation, "laws of the United States," but are law, and operative, *as regulations* only. As such they are law to the army and those whom they may concern, and so far are binding and conclusive.[5] While regulations, "intended for the government and direction" of officers and agents under his authority, would not legally restrain, in the exercise of his executive powers, the *President*, or the head of the Department by whom the same were made,[1] yet the President, as well as any other executive official, would be so far bound by general regulations framed by him that he could not justly except from their operation a particular case to which they applied.[2] Regulations are also recognized as conclusive upon the courts in cases to which they apply;[3] and when made in and for one department of the government, they are conclusive upon any other department in which, in the settlement of accounts or claims, or otherwise, they are found to be pertinent to the subject.[4]

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[1] 4 Opins. At. Gen., 62; 8 Id., 343.

[2] Gratiot *v.* U. S., 4 Howard, 117; *Ex parte* Reed, 100 U. S., 13; U. S. *v.* Eaton, 144 U. S., 688; Symonds *v.* U. S., 21 Ct. Cl., 151; In the matter of Smith, 23 Ct. Cl., 459; Smith *v.* U. S., 24 Ct. Cl., 215; 14 Opins. At. Gen., 173.

[3] Davies, (2 Ware,) 54. And see Wilson *v.* U. S., 26 Ct. Cl., 186. In McNamara *v.* U. S., 28 Ct. Cl., 420–1, the Court, referring generally to the Regulations between 1857 and 1890, say: "Those Army Regulations, having been approved by Congress, are recognized as having the force of law." [As to the approval or sanction of the Regulations of 1889, see *ante*, p. 27.]

[4] See U. S. *v.* Eaton, 144 U. S., 688.

[5] See 2 Opins. At. Gen., 520, 580; O'Brien, 31; U. S. *v.* Freeman, 3 Howard, 567; U. S. *v.* Morrison, 96 U. S., 233; also Arthur *v.* U. S., 16 Ct. Cl., 422, where it was held that a contract made by the Surgeon General with an acting assistant surgeon for a compensation in excess of that fixed by the army regulations did not bind the United States. And compare Camp. *v.* U. S., 113 U. S., 648.

The binding force and application to the army of the army regulations is illustrated by the fact that a failure to observe a regulation may constitute a military offence cognizable by court-martial under the 62d Art. of War.[5] On the other hand, officers and soldiers, in complying with an authorized regulation, will be justified in law and protected by the courts.[6]

III. PRINCIPLES GOVERNING REGULATIONS.

But, to have legal force and effect, the regulations must conform to certain principles, as follows:[7]

1. They must not contravene existing law. Regulations proper being subordinate to statutory and constitutional law, it is clear that an executive regulation may not conflict with or contravene either the Constitution or the provisions of an Act of Congress, and that, where it does so, it is, so far, of no effect.[1] So, if Congress by express legislation should cover the ground previously occupied by such a regulation, the latter would be displaced and become inoperative, the higher law being paramount.[2]

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[1] Smith *v.* U. S., 24 Ct. Cl., 215. And see U. S. *v.* Burns, 12 Wallace, 246; Byrne *v.* U. S., 23 Ct. Cl., 255.

[2] Arthur *v.* U. S., 16 Ct. Cl., 422; 10 Opins. At. Gen., 17.

[3] Lockington's Case, Brightly, 269; Maddux *v.* U. S., 20 Ct. Cl., 193; Hughes *v.* Oaks, 59 Pa. St., 52. In the latter case, (p. 42,) the court, in reference to the authority devolved upon the Secretary of the Treasury by the Acts of July 13, 1861, and May 20, 1862, to prescribe regulations in regard to commercial intercourse pending the late war, observe:—" A sound discretion is vested in him, and it being of a governmental character, it is not liable to our revision or reversal." But see *post* as to the action of the courts where regulations are not *equitable.*

[4] 5 Opins. At. Gen., 39-40; U. S. *v.* Freeman, 3 Howard, 567.

[5] DIGEST, 70, 168. And see *post*, ch. xxv.—SIXTY-SECOND ARTICLE.

[6] Gates *v.* Thatcher, 11 Min., 204. Note the Act of Dec. 17, 1813, c. 1, in regard to the laying of an embargo, in which, (s. 11,) it is provided that a collector sued for exercising certain powers under the statute, "may give this Act and the *instructions and regulations of the President* in evidence for his justification and defence."

[7] Should army regulations in the future materially fail to conform to the principles stated, they may invite from Congress action similar to that taken in 1822. See *ante.*

It is in recognition of this principle that, in statutes authorizing or directing the making of regulations, it is not unfrequently prescribed in express terms that the same shall not be inconsistent with, or contrary or repugnant to, the laws, or the Constitution and laws, of the United States, or in words of like import.[3] But such a provision is of course surplusage, a condition to this effect being always implied.

2. They must not legislate. Regulations must confine themselves within their appropriate province—must not trench upon that of legislation. A regulation which assumes to prescribe in regard to a matter which is properly a subject for original legislation, departs from "the range of purely executive or administrative action,"[1] is in a just sense a regulation no longer, and can have no legal effect as such. The leading case illustrative of this principle is that of the regulations for the navy, entitled a "System of Orders and Instructions," issued by the President in 1853, and which were condemned by Attorney General Cushing as being mainly of a "legislative quality," and in derogation of the constitutional powers of Congress, and therefore unauthorized and inoperative.[2] Similar views have been expressed by the authorities in other cases of a similar nature;[3] and it can scarcely be questioned that an army regulation which should assume to impose a condition upon the enjoyment of a statutory right or the exercise of a statutory authority, to vest or divest rights to pay[4] or rank, to restrict or extend the jurisdiction of a court-martial or otherwise administer justice,[5] to dispose of public property, to direct as to what persons should or should not be enlisted in the army,[6] to prescribe rules of evidence, or to regulate any other subject usually and properly regulated by the legislative department under the powers conferred upon Congress by the Constitution—would be *ultra vires* and unauthorized.

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[1] In U. S. *v* Symonds, 120 U. S., 49, a naval case, it is said by the Supreme Court—"The authority of the Secretary" (of the Navy) "to issue orders, regulations and instructions, with the approval of the President, in reference to matters connected with the naval establishment, is subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by Congress in reference to the navy. He may, with the approval of the President, establish regulations in execution of, or supplementary to, but not in conflict with, the statutes defining his powers or conferring rights upon others. And see S. C. in 21 Ct. Cl., 148; U. S. *v.* Webster, Daveis, (2 Ware,) 54; Boody *v.* U. S., 1 Wood. & Minot, 164; McCall's Case, 5 Philad., 259; *In re* Spangler, 11 Mich., 298; Magruder *v.* U. S., Devereux, 148; Harvey *v.* U. S., 3 Ct. Cl., 41; Morrison *v.* U. S., 13 Ct. Cl., 2; Romero *v.* U. S., 24 Ct. Cl., 331; Crenshaw *v.* U. S., 134 U. S., 109; 1 Opins. At. Gen., 470; 2 Id., 57–8, 232; 5 Id., 62; 6 Id., 10, 215, 365; 11 Id., 254; 13 Id., 516; O'Brien, 31. In a recent Order, G. O. 111, Hdqrs. Army, 1882, a certain regulation is "annulled" as being "in conflict with" a provision of the Rev. Sts.

[2] 2 Opins. At. Gen., 232. And see McCall's Case, 269, 273.

[3] See, for example, Rev. Sts., Secs. 1752, 2058, 2651, 2949, 2989, 3001, 3003, 3057, 3215, 4825, Acts of June 20, 1874, c. 344, s. 8; March 3, 1875, c. 136, s. 3; June 16, 1880, c. 253, 4; June 19, 1882, c. 231, s 1. The Act of March 1, 1875, authorizing the issue of the present army regulations, requires that they shall be "in accordance with existing laws" In Rev. Sts., Sec. 2086, it is specified that certain regulations authorized shall be "not inconsistent with treaty stipulations," (with Indians.)

Whether indeed a regulation does or does not partake of the character of legislation may sometimes be an embarrassing question. It has been remarked by Attorney General Cushing that "cases may be supposed in which it is not easy to draw the line between what is legislative and what is executive and ministerial."[7] And Chief Justice Marshall, in expressing himself to a similar effect, has added that "the precise boundary of this power," (that of making executive regulations,) "is a subject of delicate and difficult inquiry."[1]

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[1] 6 Opins. At. Gen., 15. In Magruder *v.* U. S., Devereux, 148, the Court of Claims, referring to regulations, observe—"It is the duty of the Departments to administer the law, and not to make it."

[2] 6 Opins. At. Gen., 10–19.

[3] 10 Opins. At. Gen., 11–18, 413–4; 4 Id., 226; *In re* Griner, 16 Wis., 433–4; McCall's Case, 5 Philad., 269.

[4] See Symonds *v.* U. S., 21 Ct. Cl., 152, 154.

[5] That a regulation alone cannot make an act or omission a criminal offence, but that for this a statutory requirement is essential—see U. S. *v.* Eaton, 144 U. S., 688.

[6] See THIRD ARTICLE—"Enlistment in general," Chapter XXV.

[7] 6 Opins. At. Gen., 15. Similarly Atty. Gen. Legaré, (4 Opins., 59,) refers to the authority "often delegated to the Courts to adopt rules of practice" as "in some cases falling little short of legislative power."

3. They must confine themselves to their subject. This principle is especially apposite to regulations authorized or directed by special statute to be made with regard to some particular subject: when made, they must be within the specific authority conferred, or (unless authorized under the general executive function), they cease to be operative. The application of this principle has been variously illustrated by the authorities.[2] In some cases a statute, in authorizing regulations, has expressly provided that the same shall conform to, or not contravene or be incompatible with, the provisions of the Act itself which is the source of the authority.

As to the *extent* of the authority conveyed by the statute—this, where indefinite, is to be gathered not so much from the descriptive words employed as from the *nature of the subject* to which the regulations are to apply. To the use in a statute of the words "general," "special," "general and special," "necessary," "proper," "suitable," &c., in designating the regulations to be prepared, little or no significance is ordinarily to be attached, such terms being indeed surplusage.[3] So, no materially different import, in respect to the degree of the authority, is in general to be ascribed to the words "authorized" and "required," or their synonyms. Nor is the scope of the authority necessarily to be deemed to be essentially affected by the character or dignity of the official in whom it is vested. But where the regulations are to pertain to an extended and unusually important subject, as where they are to carry into effect an entire statute of many or varied provisions; where they are to adjust the details of a ramified and comprehensive system; where high public considerations enter into the execution of the Act under which they are to be established;—in cases such as these the authority must needs be larger and more liberally construable than where the subject of a single provision, or a subject of a limited range or consequence, is to be regulated.[1] The widest discretion in the framing of regulations may, it is conceived, properly be taken by the Executive in a case where the enactment conveying the authority has been prompted by the necessities of a grave public emergency, and especially an existing or impending state of war.[2]

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[1] Wayman *v.* Southard, 10 Wheaton, 43, 46. And to a similar effect, see *In re* Oliver, 17 Wis., 681; Cooley, Prins. Const. Law, 44.

[2] See Aldridge *v.* Williams, 3 Howard, 29; Allen *v.* Colby, 47 N. H., 544; Antrim's Case, 5 Philad., 285; McCall's Case, Id., 259; Newman *v.* Wright, 28 Ind., 105; 5 Opins. At. Gen., 39–40, 62; 10 Id., 476–479. And compare In the matter of Ferrens, 3 Benedict, 442, where it was held that the "regulations for the government of the army" referred to in the Act of July 28, 1866, s. 37, applied only to persons actually in the army, and not to persons *to be* enlisted.

[3] In Gates *v.* Thatcher, 11 Minn., 204, the court in construing a provision of an Act of Feb. 24, 1864, providing for the furnishing by a drafted person of a substitute, "subject to such rules and regulations as may be prescribed by the Secretary of War," remark: "Clearly, we think, by this provision, the Secretary of War may prescribe any regulations *necessary or reasonable* to protect either the government, the substitute, or the principal."

4. *They must be uniform.* The further minor principle has also been noticed by the authorities that regulations must be "*uniform*," that is to say in their application;—that they must apply equally and alike to all the persons or subjects of the class to which they relate. In this view, Attorney General Legaré, in advising the Secretary of the Treasury as to certain regulations to be issued by him under the revenue laws, observes—"I need scarcely add that your regulations must be uniform throughout the Union."[3] So the Supreme Court, in an adjudged case,[4] remark, of army regulations, that they "must be uniform and applicable to all officers under the same circumstances." In a few instances the public statutes, in providing for regulations, have specially required that they be "uniform."[5]

5. *They should be equitable.* It need scarcely be added that regulations should be just and equitable—that they should not be arbitrary or oppressive.[6] As already noticed, a regulation cannot deprive a person of a legal right,[1] and where a regulation is found to work an injustice in any material matter, as in the settlement of an officer's accounts, it will be disregarded by the courts.[2]

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[1] See The Thomas Gibbons, 8 Cranch, 428–9; Lockington *v.* Smith, 1 Peters, C. C., 470–473.

[2] Hughes *v.* Oaks, 59 Pa. St., 41, 42.

[3] 4 Opins., 63.

[4] U. S. *v.* Ripley, 7 Peters, 25. And see U. S. *v.* Webster, Daveis, (2 Ware,) 60.

[5] As in the Acts of Aug. 10, 1846, c. 175, s. 2; March 3, 1863, c. 71, s. 27.

[6] "It would be directly repugnant to the character of the power conferred, to suppose that a power to make *rules* was a power to dispense with them altogether, and to substitute in their place caprice or arbitrary discretion." Atty. Gen. Toucey, 5 Opins., 42.

Objectionable Features of Army Regulations. To the student, as well as in practice, army regulations are the most unsatisfactory element of our written military law. Presented in connection with statutes from which they are sometimes imperfectly discriminated; not unfrequently themselves partaking of the character of legislation and thus of doubtful validity;[3] and fatally subject, as we have seen, to constant and repeated modification, their effect too often is to embarrass and mislead where they should assure and facilitate. To render them entirely useful, they should, in the opinion of the author, be reduced to the smallest available bulk; all that are really statutes and all that are of a legislative quality should be eliminated; only those should be included that are purely *general*, those relating to the business of the staff corps being left to be established by the heads of the same, subject to the approval of the President; and the authority to amend should be most rarely exercised.

IV. SPECIAL SETS OF REGULATIONS.

Besides the special regulations for certain of the staff departments of the Army—as the Ordnance, Medical Subsistence, &c., departments—which are contained in the General Army Regulations, there are special sets of regulations, in no part embraced therein, which may properly be noticed in this Chapter—as follows:

1. The Regulations for the Military Academy. While the cadets, professors, etc., of the West Point Military Academy, are, as a part of the Army, subject to the Army Regulations, so far as applicable to them,[4] they are also subject to special regulations framed expressly for their government as a separate branch of the military establishment. These regulations, initiated in the authority given by or implied from the Acts of March 16, 1802, c. 9, s. 26–28, and April 29, 1812, c. 72, s. 3, organizing and making provision for the corps of engineers,[1] now consist of a set, of 362 paragraphs, published in 1877, and republished June 1, 1883; this revision having been preceded by various issues, of which the principal were published in 1831, 1853, 1857, 1866 and 1873. Less extended regulations had previously existed in writing and are found in records of the Engineer bureau dated as early as in 1817 and 1818.

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[1] See 4 Opins. At. Gen., 223.

[2] U. S. *v.* Cadwalader, Gilpin, 563. And see U. S. *v.* Mann, 2 Brock. 9, 11.

[3] See instances referred to in DIGEST, "Army Regulations," § 6.

[4] 7 Opins. At. Gen., 328.

The regulations of 1883, with a few amendments since made, constitute the Regulations of the Military Academy.

The authority and binding force of the special regulations for the Academy, and the power of the President to modify and add to the same, have been recognized in the opinions of the Attorneys General.[2]

It need hardly be observed that the principles, heretofore indicated as properly governing the framing of general regulations for the army and their substance, are equally applicable to these special regulations.[3]

2. Regulations for the Military Prisons. The Act of March 3, 1873, c. 249, which provided for the establishment of the Military Prison maintained at Fort Leavenworth, Kansas, required the Secretary of War to organize a Board of direction which, it was added, should "frame regulations for the government of the prisoners in accordance with the provisions of the Act."[4]

A set of regulations for this purpose was published from the

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[1] The published volume includes also regulations specially authorized or directed, by Secs. 1319 and 1330, Rev. Sts., to be prescribed for the examination of appointees to cadetships, and in regard to the granting of leaves of absence to officers of the Academy.

[2] 1 Opins. At. Gen., 469; 7 Id., 328.

[3] The only portion of these regulations which would appear to be subject to legal criticism is that relating to "Discipline." Some of the paragraphs under this head are in the nature of *articles of war*, and might thus be deemed to trench upon the province of *legislation*.

[4] Rev Sts., Sec. 1345.

By a recent Act of March 2, 1895, this Prison is "transferred from the Department of War to the Department of Justice, to be known as the United States Penitentiary."

Headquarters of the Army in G. O. 12 of February 19, 1877, and subsequent amended sets in G. O. 100 of 1883, G. O. 5 of 1888, and G. O. 131 of 1890. These relate to the duties of the officers and employees at the institution and the books and accounts to be kept by them, and further to the admission, classification, diet, clothing, labor and discipline, of the prisoners, the school and library for the same, &c.

For the military prison at Alcatraz Island, California (not established by statute), rules and regulations were adopted and published by an order of the Department Commander, dated August 29, 1873, and revised and republished in August, 1880.

3. Regulations for the Soldiers' Home and the National Home for Disabled Volunteer Soldiers. As the former of these institutions is placed under military direction, and the inmates of the latter are discharged officers and soldiers, the regulations for the same may properly be noticed here.

Soldiers' Home. By the Act of March 3, 1851, c. 25, entitled "an Act to found a Military Asylum," it is provided that certain designated officers of the army "shall be *ex officio* Commissioners of the same," and these Commissioners are further empowered to establish from time to time regulations for the government and direction of the institution, subject to the approval of the Secretary of War.[1]

Under this authority regulations were adopted on March 27 and May 30, 1851, which were revised October 8, 1866. A new set was adopted January 31, 1883, which, however, was replaced by a revised set—that now in force—of April 9, 1883, approved by the Secretary of War, April 17, 1883. These regulations relate to the qualifications for admission to the Home, applications for admission, the rights and privileges of the inmates and their government, the duties of the officers of the institution, function of the Board of Commissioners, &c.

Volunteer Home. By the Act of March 3, 1865, incorporating this institution, as amended by that of March 21, 1866, the designated Board of managers, who are also the corporation, are authorized "to make by-laws, rules and regulations, for carrying on the business and government of the home, and to affix penalties thereto."[1]

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[1] Rev. Sts., Sec. 4815. Amended, and the Board of Commissioners reconstituted, by Act of March 3, 1883, c. 130.

Pursuant to such authority, there was adopted by the Board in 1866 a set of by-laws and regulations, consisting of 23 Articles, and relating mainly to the appointment and duties of the officers of the institution and the admission and disposition of its beneficiaries. In Art. 18, in which the duties of the "Governor" are set forth, it is provided that—"he shall from time to time make printed rules for the government of the employees and inmates of the Institution." Such rules have accordingly been made and published, in the form of General and Special Orders, &c., relating to military organization, discipline, labor, police, inspection, superintendence of shops, farm, &c., creation of a fire company, use and disposition of clothing, issue of quartermaster stores and tobacco, free postage, passes, and a variety of other subjects. The Regulations of the Home were republished, with additions, in 1892.

4. Other Special Regulations. Other formulated regulations for purposes of instruction, administration, &c., in the army, have been promulgated from time to time, of which the following are the principal: The "Firing Regulations for Small Arms," adopted in G. O. 1 of 1889; The "Infantry Drill Regulations," adopted October 3, 1891; The "Cavalry Drill Regulations," adopted on the same date;[2] The Regulations for the examination of officers for promotion, published in G. O. 80 of 1891, amended in G. O. 6 of 1893; The Regulations for the examination of enlisted men for promotion to the grade of lieutenant, published in G. O. 79 of 1892; The Regulations in regard to the detail and duties of officers assigned to colleges, last issued in G. O. 93 of 1893; The Regulations accompanying the code of maximum punishments, contained in G. O. 21 of 1891, amended by G. O. 16 of 1895; The Regulations for the government of the Army and Navy General Hospital at Hot Springs, Arkansas, set forth in G. O. 60 of 1892; The "Post Exchange Regulations," published in G. O. 46 of 1895.

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[1] Rev. Sts., Sec. 4825.

[2] With these Regulations may be classed the "Army Artillery Tactics," adopted July 17, 1873; the "Manual of Heavy Artillery," (Tidball's,) adopted Dec. 10, 1879; the "Manual of Guard Duty," (Kennon's,) adopted by G. O. 26 of 1890, and similar publications.

II. ORDERS.

All orders, written or oral, made or given by any competent authority, from the commander-in-chief to an acting corporal, are indeed in a general sense a part of the law military; their observance by inferiors being strictly enjoined and their non-observance made strictly punishable. The orders, however, to which reference is now to be made, are the formal, generally printed, Orders, issued by the highest authority of the Army or of some high command, and preserved as a part of the permanent records of the military establishment.

Orders of the President. As constitutional Commander-in-chief of the Army, and independently of course of any authorization or action of Congress, the President is empowered to issue orders to his command; and the orders duly issued by him in this capacity, while ordinarily of but temporary importance as compared with his general army regulations, are obligatory and binding upon whom they concern, and so properly classed as a portion of the general law military. The validity and force of such orders have been repeatedly recognized by the authorities.[1]

Their form and contents. The orders of the President, as commonly issued, are in the form of, and designated as, General and Special Orders; the latter which relate chiefly to individual cases not being, in practice, published to the army at large. Since 1864, the orders announcing the action of the President upon the proceedings of general courts-martial, which before were incorporated with the other General Orders, have been separately issued and numbered under the name of General Court Martial Orders.[2] Both General and Special Orders have formerly for considerable periods emanated, and may still emanate, directly from the Secretary of War, who, in making and publishing the same, as in most of his other official proceedings,[1] acts as the representative and presumably by the direction of the President;[2] the indication—"by the direction of the President," though not essential,[3] being not unfrequently expressed. Such Orders are now, however, usually promulgated through the Headquarters of the Army; although the provision of the Act of March 2, 1867, *requiring* that "all orders and instructions relating to military operations" should be "issued through the General of the Army," was *repealed* by the Act of July 15, 1870, c. 294, s. 15. The only Orders of this class which are now, in practice, signed by the President are those setting forth his action on sentences of court-martial, of which his confirmation is required by law—as sentences of dismissal of officers. This sign-manual is not, however, necessary even here.[4]

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[1] See 2 Opins. At. Gen., 225, 228, 232; 5 Id., 15; 10 Id., 14; The Thomas Gibbons, 8 Cranch, 427; U. S. *v.* Freeman, 1 Wood. & Minot, 50; Cowell *v.* Hopkinton, 45 N. H., 14; also the Act of Feb. 19, 1873, c. 169.

Congress has, in some instances, expressly directed that certain matters "be published in General Orders." See Acts of June 25, 1864, c. 149, s. 2; July 4, 1864, c. 253, s. 6, 10.

[2] Similar forms and designations are given to the Orders issued from the Headquarters of Military Divisions and Departments, and of Armies in time of war.

[But see, now, G. O. 29 of 1894, directing the resuming of the old form of publication in "*General Orders,*" "in cases of officers and in important cases of enlisted men."]

As has heretofore been noticed, the General Orders in force on February 17, 1881, were, by the authority and direction of the Act of June 23, 1879, compiled and published by the Secretary of War in connection with the existing Army Regulations, and printed therewith in the volume issued from the War Department on the date first named: they were thus practically converted into regulations. So the volume of the succeeding and now existing Regulations of 1889 purports to contain "a condensation and revision of all regulations and *standing orders* in force at its date."

The General Orders cover a great variety of particulars connected with the discipline, employment, pay, clothing, subsistence, quartering and transportation of the army, the providing them with animals, arms, munitions, &c. As certain so-called "Regulations" are not properly classed as such, so a considerable proportion of the General Orders are not orders at all but *media* for the promulgation to the army of new legislation of Congress, regulations made or amended, appointments, promotions, etc., of officers, opinions of courts or law-officers, or other matters of information of value to the service. In time of peace indeed the Special Orders, by which direction is more commonly given as to the duties of inferior officers, changes in station, details of general courts, discharges of soldiers, &c., &c., are in a larger proportion orders proper than those designated as General. In connection with the General Orders are from time to time published "Circulars" to the army, the usual purpose of which is not to convey commands but to communicate rulings and decisions of the Secretary of War, and to advise officers, etc., of matters of which they will properly take notice in the course of the performance of their functions and duties.

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[1] In *all*, except where Congress has, as it may do, invested him with independent powers or devolved upon him independent duties. Kendall *v.* U. S., 12 Peters, 610.

[2] Parker *v.* U. S., 1 Peters, 297; U. S. *v.* Eliason, 13 Id., 302; U. S. *v.* Freeman, 1 Wood & Minot, 50; Lockington's Case, Brightly, 282; *In re* Spangler, 11 Mich., 313, 322; *In re* Neagle, 39 Fed., 834; Opins. At. Gen., 380; 7 Id., 453; 10 Id., 14; 14 Id., 458.

In some instances during the late war, orders termed "Executive Orders," or "War Orders," were issued directly by the President in his own name, similarly to proclamations. See such orders in Vol. XIII. Stats at Large, pp. 775-778; G. O., War Dept., of March 11, 1862; Do. 252, 300, 331, of 1863; Do. 35, 100, 308, of 1864.

[3] See 17 Opins. At. Gen., 19, 44; 15 Do., 290.

[4] U. S. *v.* Page, 137 U. S., 673.

Orders of Military Commanders. Of a similar force and effect to the Orders of the President, though within a narrower range, are the General and General Court Martial Orders, and Special Orders, made and published by the superior military commanders, such as commanders of Divisions and Departments. As to the Orders thus promulgated in their general military capacity, these commanders directly represent, and exercise in a greater or less degree the authority of the Commander-in-Chief.[1] In the Orders in which they act upon the proceedings and sentences of courts-martial, they exercise an authority expressly conferred upon them by statute, though here too they act practically as substitutes for the Commander-in-chief. The very numerous Orders, especially of the latter character, issued *during the late war*, are a monument to the fidelity to duty and scrupulous regard for justice which have in general characterized our high commanders in war as well as in peace. In the thousands of these Orders published during that period from the headquarters of the various departments, divisions, districts, brigades, armies and army corps, the errors of law discovered have been strikingly few, and the cases in which justice has not clearly been duly administered most rare. To these Orders, as a most valuable part of our military law and history, references will be abundantly made in the course of the following Chapters.

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[1] See Lockington's Case, Brightly, 289; Clark *v.* Dick, 1 Dillon, 8; Napier, 57, 115.

Principles governing Orders. As in the making of Regulations, so in the framing of Orders, the principles heretofore laid down to the effect that executive acts may not trench upon the province of legislation, or conflict with the existing constitutional or statutory law, are to be strictly observed.[1] Further, Orders should not conflict with established Regulations.[2] And Orders issued by commanders of departments or armies, or other military authorities inferior to the President, may not contravene the orders of the latter as Commander-in-chief.

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[1] 2 Opins. At. Gen., 230–234; 6 Id., 15. In an Act of March 3, 1863, two designated General Orders of the War Department, relating to enlistments, were in express terms "*rescinded*" by Congress.

[2] 2 Opins. At. Gen., 230–234; 10 Id., 17.

CHAPTER IV.

THE UNWRITTEN MILITARY LAW.

WHILE the Military Law has derived from the Common Law certain of the principles and doctrines illustrated in its code,[1] it has also a *lex non scripta* or unwritten common law of its own. This consists of certain established principles and usages peculiar or pertaining to the military status and service, and which, though unenacted, are recognized in the 84th article of war, under the designation of "the custom of war," as a means for the guiding of courts-martial in the administration of justice in doubtful cases. The same are also recognized by the courts and legal authorities as operative and conclusive as to questions in regard to which the written military law is silent.[2]

This unwritten law may be said to include:—1. The "customs of the service," so called; 2. The unwritten laws and customs of war.

1. Usages or Customs of the Service. These, whether originating in tradition or in specific orders or rulings, are now, *as such*, not numerous, a large proportion, in obedience to a natural law, having changed their form by becoming merged in written regulations embraced in the General Regulations of the Army.[3]

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[1] See 1 Opins. At. Gen., 233; 6 Id., 204; Prendergast, 200.

[2] "The general usage of the military service, or what may not unfitly be called the customary military law." Story, J., in Martin *v.* Mott, 12 Wheaton, 35. And see Barwis *v.* Keppel, 2 Wilson, 314; U. S. *v.* Macdaniel, 7 Peters, 14; U. S. *v.* Webster, Daveis, (2 Ware,) 42, 43, 56; 1 Opins. At. Gen., 699; 2 Id., 461; 1 Bishop, C. L., § 50; Cooley, Prins. Const. Law, 137; Prendergast, 53; Simmons, § 80; Clode, M. L., 128; O'Brien, 223; De Hart, 20; Kautz, Customs of the Service. For an *express statutory* recognition of "the usages and customs of armies," and "the custom and usage of the sea service," see c. 27, s. 8, and c. 24, s. 11, Acts of March 2, 1799.

[3] Compare U. S. *v.* Webster, Daveis, (2 Ware,) 56; O'Brien, 223.

The regulations, for example, on such subjects as discipline, precedence, command, arrests, and the procedure of courts-martial, are in great part but the specific expression of usages of more or less early date, most of which have come to us from the British service.

As to the procedure of military courts. Here, however, *usage* still governs as to various important particulars. Thus a reference to usage as furnishing a guide for the judgment of the court upon the FINDING is not unfrequently required to be made on military trials, and especially as apposite to the question whether the facts alleged or proved constitute the military offence charged. For example,—whether an order which the accused is charged to have disobeyed was a "lawful" order; whether the accused is to be considered as having been "on duty" at the time of his alleged offence; whether an officer charged to have been assaulted by a soldier was at the time "in the execution of his office;" whether certain acts amount to "conduct unbecoming an officer or a gentleman," or to "conduct to the prejudice of good order and military discipline;" in what acts consist the offences of false muster, mutiny, misbehavior before the enemy, breach of arrest, or desertion;—as to such questions, the court in deliberating upon its judgment (as also the commander in passing upon the same), will constantly recur to the general usage of the service as understood and acted upon by military men.

Usage may also be authoritative in connection with the question of the punishment to be imposed by the SENTENCE. The Articles of war and the Regulations indeed specify nearly all the *species* of punishment to which an officer or soldier may be subjected; but to determine in some cases as to the *kind*, and in others as to the *degree*, in amount or duration, of the proposed punishment; to decide whether the same is sanctioned by custom or is "unusual;" as also in some instances to indicate or direct as to the form of the execution of the penalty—the court, (or the reviewing authority,) will not unfrequently have occasion to take into consideration the unwritten law or practice of the service.[1]

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[1] Less frequently now indeed, in view of the enactment of the statute of Sept. 27, 1890, c. 998, authorizing the President to prescribe *maximum* punishments—since prescribed by him in G. O. 21 of 1891, (amended by G. O. 16 of 1895.)

2. Laws or Customs of War. These are the rules and principles, almost wholly unwritten, which regulate the intercourse and acts of individuals during the carrying on of war between hostile nations or peoples. While properly observed by military commanders in the field, they may often also enter into the question of the due administration of justice by military courts in cases of persons charged with offences growing out of the state of war. Such laws and customs would especially be taken into consideration by *military commissions* in passing upon offences in violation of the laws of war. But courts-martial also, in time of war, may have occasion to recur to the same, upon trials of military offences peculiar to a state of war and expressly made cognizable by such courts by the Articles of war—as, for instance, the offences of relieving an enemy (Art. 45), corresponding with or giving intelligence to an enemy (Art. 46), forcing a safeguard (Art. 57), and the offence of the spy.[1] (Sec. 1343, Rev. Sts.) And so, upon trials involving the rights or obligations of prisoners of war. In such cases the unwritten laws and customs of war, as generally understood in our armies or as defined by writers of authority, will often properly be consulted as indicating whether certain acts are to be regarded as constituting the offences charged, or what measure of punishment will be just and adequate in the event of conviction. Certain of these laws and customs will hereafter be referred to in considering particular Articles of war. In the main, however, they pertain to the separate Title of the LAWS OF WAR, the subject of PART II. of this work.

Essentials of a Usage or Custom. As to what constitutes a usage or custom in law,—it is laid down by the authorities that it must consist of a uniform, known practice of long standing, which is also certain and reasonable,[2] and is not in conflict with existing statute or constitutional provision.[1] A civil custom cannot set aside or modify the statute law,[2] or subsist in regard to any matter regulated by such law.[3] Moreover a prevailing usage is superseded when an enactment is made covering the subject: a usage can grow up or continue only in reference to a subject upon which the written law is silent or quite obscure. So, a usage or custom of war or of the military service, to be recognized and acted upon as such by a military court or commander, must have prevailed without variation for a long period, must be well defined, equitable, and uniform in its application, must not be prejudicial to military discipline, and must not only not be at variance with the statute or written law relating to the army but must pertain to a subject not provided for by such law.[4] A ministerial officer (as it has been observed by a U. S. Court)[1] cannot institute a usage, but the same must be built up out of a series of precedents;[2] so, a custom of the service cannot be created by isolated or occasional instances,[3] or by the practice of a particular command or commander,[4] but must be a usage of the army at large or of some separate or distinct branch of the military establishment, as, for example, the Military Academy and Post of West Point. An illegal or unauthorized practice, however frequent or long continued, cannot constitute a legal usage.

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[1] The original Article of War of 1806, in regard to spies, provided that, on conviction, they should "suffer death according to the law and usages of nations."

[2] U. S. *v.* Duval, Gilpin, 356; Collings *v.* Hope, 3 Washington, 149; U. S. *v.* Buchanan, 8 Howard, 102; Knights of Pythias' Case, 3 Brewst., 452; Minis. *v.* Nelson, 43 Fed., 777; 2 Greenl. Ev., § 251; 2 Parsons, Con., 48; Lawson on Usages and Customs, 2–15. It must be so long-continued and notorious that all persons concerned may be presumed to have knowledge of it. Wadley *v.* Davis., 59 Barb., 503; Saint *v.* Smith, 1 Cold., 51.

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[1] Thompson *v.* Riggs, 5 Wallace, 680; The Floyd Acceptances, 7 Id., 677. "No erroneous practice of however long standing can justify the allowance of a claim" against "the true intent and meaning" of a statute. U. S. *v.* Freeman, 3 Howard 564. Usage "arises from long recognized rights countervened by no legislative action." Miller *v.* McQuerry, 5 McLean, 472. And see authorities cited in preceding note; also G. C. M. O. 86, Dept. of Dakota, 1892.

[2] 6 Opins. At. Gen., 73. But though usage cannot alter the statute law, it may be evidence of the construction given to it. U. S. *v.* Gilmore, 8 Wallace, 330; 2 Opins. At. Gen., 460; 3 Id., 363. It may also be evidence of the intent or purport of a regulation. 2 Id., 560, 705; 8 Id., 5. This is especially true of the usages of the executive departments of the government. U. S. *v.* Gilmore; U. S. *v.* Lytle, 5 McLean, 17; U. S. *v.* Maurice, 2 Brock, 100.

[3] "Generally, a statutory enactment controls all prior usages and laws, and establishes the rule which governs the subject-matter." U. S. *v.* Collier, 3 Blatchford, 332.

[4] "In order to apply it" (the custom of war) "to any particular case, it must be certain and well defined, and clearly not opposed to any law or regulation." De Hart, 20. There can be "no excuse for a practice which, with whatever good intentions, is forbid by law." G. O. 1, War Dept., 1861. "Customs of service can only be taken as precedents to follow, when intrinsically proper of themselves, and supplementary of the written law and regulations, on points on which the latter are silent, and when not in direct opposition to these." G. O. 2, Dept. of Texas, 1874. (Gen. Augur.) "The evidence of a custom to disobey a General Order was rightly rejected by the court. A custom, to be a good one, must not be contrary to law, or the law governing troops, but must be a general custom, a well-known custom to all the command." G. C. M. O. 2, Dept. of Va. & No. Ca., 1865. (Gen. Butler.) And see Hough, C. M., 372, 620; G. O. 4, Dept. of La., 1866; Do. 15, First Mil. Dist., 1870. That a custom of the service must be *uniform* is held by the court in U. S. *v.* Buchanan, Crabbe, 578, where, referring to an alleged usage in regard to the

Custom of the Service as a Defence. It will be apparent from the foregoing that an alleged military usage cannot avail an officer or soldier charged with a military offence, to vindicate his act, except where its existence and its lawfulness are susceptible of exact proof. "Custom of the service"—it is remarked in a General Order[5]—"is a treacherous tribunal, and it is a hazardous thing for an officer to appeal to it to justify failure to obey orders or a departure from strict compliance with the articles of war." The existence in a command of an unauthorized practice, sanctioned by a commanding or superior officer, may sometimes extenuate the act of a subordinate who adopts it, but, unlike a legal custom, it cannot serve as a *defence*.[6]

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emoluments of pursers in the navy, it is said: "A usage to be binding must be uniform and applicable to all officers of the same grade under similar circumstances." In 4 Opins., 18, Atty. Gen. Legaré, in allusion to a supposed usage of courts-martial in regard to adjournments, says: "This I understand to be the uniform practice; and uniform practice is good law in such cases when it is not unreasonable and works no wrong."

[1] U. S. *v.* Babcock, 4 McLean, 113.

[2] See 5 Opins. At. Gen., 351.

[3] U. S. *v.* Buchanan, 8 Howard, 102.

[4] Compare Greenwich Ins. Co. *v.* Waterman, 54 Fed., 839.

[5] G. O. 42, Dept. of Washington, 1866. (Gen. Augur.) And see G. C. M. O. 86, Dept. of Dakota, 1892.

[6] In G. C. M. O. 1, Dept. of the Mo., 1885, the court, in connection with its sentence, observes: "The court is of opinion that the following of an unauthorized and pernicious custom constitutes no good defence for any neglect on the part of the accused." [For "custom" the term should, strictly, have been *practice*: custom proper cannot, of course, fitly be described as "unauthorized."] And see Do. 22, Id., 1887.

CHAPTER V.

THE COURT-MARTIAL—ITS HISTORY AND NATURE.

HAVING seen in what consists Military Law, we proceed to consider the tribunal by which it is mostly administered—the Court-Martial. The subject will be presented, in this and succeeding Chapters, under the following heads:

I. The Origin and History of the Court-Martial.
II. Its Nature as a legal tribunal.
III. The Constitution of General Courts-Martial.
IV. The Composition of General Courts-Martial.
V. The Jurisdiction of General Courts-Martial.
VI. The Procedure of General Courts-Martial.
VII. The Inferior Courts-Martial.

THE ORIGIN AND HISTORY OF COURTS-MARTIAL.

Early Forms—The Franco-German System. Some form of tribunal for the trial of military offenders would appear to have coëxisted with the early history of armies. In those of Rome justice was commonly administered by the *magistri militum*, and especially by the legionary tribunes, either as sole judges or with the assistance of councils.[1] Among the early Germans, judicial proceedings in time of peace were conducted by the Counts assisted by assemblages of freemen; in time of war by the Duke or military chief, who, as heretofore remarked, usually delegated his jurisdiction to the priests who accompanied the army and carried its banners. At a later period arose courts of regiments, held either by the colonel or by an officer invested by him with the staff or mace called the *regiment*, as the emblem of judicial authority, and of which courts-soldiers as well as officers were eligible as members: for the trial of high commanders the King convened courts of bishops and nobles. During the Middle Ages, however, the civil and military jurisdictions were, as indicated in Chapter II., but imperfectly distinguished, and it was not till a comparatively modern date that special courts administering military códes may be said to have been instituted.[1] In France, courts-martial (*conseils de guerre*,) appear to have been first established by an ordinance of 1655, military persons having previously been subjected to the jurisdiction, successively, of the Mayor of the Palace, the Grand Seneschal, the Constable, and the Provost Marshals.[2] In Germany, courts-martial proper, (*militärgerichts*,) may probably be traced back to the articles, already referred to as earliest in date, of the Emperor Frederick III. of 1487: they were specifically provided for—the remarkable "*spear*" court, (in which the assembled regiment passed judgment upon its offenders,) being especially characterized—in the penal code of Charles V., though more accurately defined in the articles of Maximilian II., of 1570.[3] Meanwhile, however, the Anglo-Norman system of administration of justice, in which the courts were open, the prosecution was public and verbal, the accused was tried by a *jury* of his peers or military associates upon specific charges and was permitted to be heard in his defence, and the proof was made by the examination of witnesses—in contradistinction to the *inquisitorial* method which was subsequently adopted—had extended to England, Sweden and Russia, and prevailed generally throughout Europe.[4] The courts established by the codes and articles, (heretofore specified,[5]) of the sixteenth and seventeenth centuries[6] were courts of this system, and to such courts the present British and American court-martial is more nearly assimilated in its procedure than to the now-existing military court of Germany or France.

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[1] Bruce, Insts., 295–300; Adams, Roman Ant., 330; De Chenier, Guide des Tribunaux Militaires, Introd.; Von Molitor, Kriegsgerichte und Militärstrafen, 11.

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[1] See Von Molitor, *ante;* Ayala, de Judiciis Militaribus; Le Faure, Lois Militaires de la France; De Chenier, *ante;* Bruce, 300.

[2] Le Faure, p. 141. And see Foucher, Code de la Justice Militaire, p. 3.

[3] Koppmann, Militärstrafgesetzbuch; Von Molitor, *ante.*

[4] Von Molitor, Sec. 1 § 8.

[5] See Chapter II.

[6] See especially the Articles of Gustavus Adolphus, in Appendix.

British Courts-Martial.—***The Court of Chivalry.*** In the English law, the original of the modern court-martial is discovered in the "King's Court of Chivalry," or "Court of the High Constable and Marshal of England"—sometimes also designated as the "Court of Arms" or "Court of Honour"—of which the judges were the Lord High Constable and Earl Marshal. These officials, who date from the times of the Frankish—Carlovingian—Kings, are said to have formed a part of the *Aula Regis* of William the Conqueror, but it was, apparently, not till the subdivision of that tribunal into separate courts by Edward I, in the latter part of the 13th century, that the Court of Chivalry began to have a distinct existence. Thus instituted, it came to exercise an extended jurisdiction, both civil and criminal; taking cognizance not only of "all matters touching honor and arms," "pleas of life and member arising in matters of arms and deeds of war," "the rights of prisoners taken in war," and, generally, of "the offences and miscarriages of soldiers contrary to the laws and rules of the army," but also of civil crimes and matters of contract.[1] Having thus indeed gradually encroached upon the other courts of common law, the Court of Chivalry was subsequently, by acts of parliament, restrained and curtailed of much of its power; and, the office of High Constable having, as a permanent judicial function, been discontinued, upon the attainder of the then Constable, in the 13th year of Henry VIII, this tribunal, though at first held at intervals by the Marshal alone, fell into disuse. From a case adjudged in the Court of Queen's Bench so recently as in the 1st year of Anne,[2] it is seen that the Court of Chivalry, as held by the Marshal, still survived with a doubtful and trifling jurisdiction apparently rarely exercised. But though never abolished by specific statute, it had, some time before the English Revolution, practically ceased to exist as a military tribunal.[3]

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[1] A corresponding jurisdiction was exercised in *naval* cases by the Lord High Admiral. Thring, 5; Clode, M. L., 41.

[2] Chambers *v.* Sir John Jennings, 7 Mod., 127, and 2 Salk., 553.

[3] Upon the history of the Court of Chivalry, see Coke, 4 Inst., 123; Hale, Hist. Com. Law, 42; Hawk, P. C., b. 2, c. 4; 3 Black. Com., 68; 4 Stephen, Com., 329; Boyer, Com. Const. Law, 281; 2 Grose, Hist. Eng. Army, 58–60; Tytler, 38–42, 46, 377–392; Adye, 1–12; 2 McArthur, 15–20; Pipon & Col., 7–9; Clode, M. L., 83, 158; Id., 1 M. F., 76, 473; Pratt, 6; Lieber, Observations on origin of military trials, &c., N. York, 1876; Chambers *v.* Jennings, *ante; Ex-parte* Reed, 100 U. S., 20.

Later history. Upon its decadence, and during the interval preceding the first Mutiny Act, justice was administered, in the military forces from time to time raised, mostly by martial courts or councils held under the ordinances or articles heretofore noticed,[1] or assembled by special commission issued under the royal prerogative, or what was arbitrarily assumed to be such.[2] During the reigns especially of the Tudors and Stuarts, and prior to the Petition of Right, military law, as administered, more nearly resembled the martial law than the military law of modern times; trials of civilians by courts-martial, and the imposition by the same of the death penalty, being sanctioned in cases in which the law of the land did not authorize such jurisdiction or punishment.[3] It was such arbitrary exercise of military authority which was doubtless had in view by Hale[4] and Blackstone[5] in their apparent confounding of military with martial law, to the disparagement of the former.

At length, by the original Mutiny Act of 1689, already described, the infliction of the death penalty within the Kingdom was prohibited except upon conviction of mutiny, sedition, or desertion, and the Sovereign, (for the first time by legislative authority,) was expressly empowered to grant commissions to convene courts-martial, whose jurisdiction and powers, extended and developed in subsequent Mutiny Acts and Articles of War, have finally—as has been seen in Chapter II—been established and defined in the Army Act of 1881. These powers, as compared with those of our own military courts, will be frequently referred to in the course of this treatise.

The American Court-Martial. The English military tribunal, transplanted to this country prior to our Revolution, was recognized and adopted by the Continental Congress, in the first American Articles of war of 1775, where the different courts-martial—*General*, *Regimental*, and detachment or *Garrison* courts—were distinguished, and their composition and jurisdiction defined. These provisions were modified and enlarged in the succeeding Articles of 1776 and 1786, and in the latter the authority to order general courts was more precisely indicated. Coming to the period of the Constitution—that instrument, while expressly empowering Congress to provide for the government of the army, and thus to institute courts-martial,[1] also recognized—in the Vth Amendment—the distinction between civil offences and those cognizable by a military forum.[2] But, in legislating in view of these provisions, Congress did not originally create the court-martial, but, by the operation of the Act of September 29, 1789,[3] continued it in existence as previously established. Thus, as already indicated, this court is perceived to be in fact older than the Constitution,[4] and therefore older than any court of the United States instituted or authorized by that instrument.

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[1] See Chapter II.

[2] Grant *v.* Gould, 2 H. Black, 69, 84; Tytler, 48–58; Adye, 13–15; 2 McArthur, 20; Kennedy, 1; Pipon & Col., 9–12, 17–18; Pratt, 7.

[3] 1 Black, Com., 414; Hallam, Const. Hist., vol. 1, pp. 325–330, 531; Manual, 7–8, cited in Ch. II., p. 8, note. Col. Woodward's Essay on Mil. & Mar. Law, United Service Mag., Oct., 1879.

[4] Hist., Com. Law, c. 2.

[5] "Martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is, as Sir Matthew Hale observes, in truth and reality no law, but something indulged rather than allowed as a law. The necessity of order and discipline in an army is the only thing which can give it countenance." 1 Black. Com., 413. And see 8 Opins. At. Gen., 365–6; also Part II.—MARTIAL LAW.

The revised code of Articles of war soon after enacted, *viz.*, by the Act of April 10, 1806, repeated the provisions of 1786 in regard to courts-martial, with some slight modifications consisting mainly in extending the authority to convene general courts and in substituting the President for Congress in the cases in which the latter had previously been vested with final revisory authority.

These earlier codes, as also the later Articles, have been considered in Chapter II., and are set forth in the Appendix.

Between 1806 and 1874, a fourth court-martial—the *Field-Officer's Court*, authorized however only in time of war—was added to those previously established; the authority to order general courts was still further extended, and their jurisdiction and powers were enlarged. The legislation by which these changes were introduced has been heretofore indicated as embraced in the code of Articles contained in the Revised Statutes of June 22, 1874. The subsequent amendments to these Articles and other enactments affecting the same—including that of October 1, 1890, adding the *Summary Court* to the list of military tribunals—have already been specified. The Articles of 1874, with these later provisions, comprise the *existing statute law* in regard to the constitution, composition, jurisdiction, powers and procedure of American courts-martial. The *regulations* and *usages* relating to their forms and practice have been referred to in previous Chapters.

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[1] See Dynes *v.* Hoover, 20 Howard, 79; *Ex parte* Reed, 100 U. S., 21; *Ex parte* Biggers, 1 McM., 69; 5 Opins. At. Gen., 508.

[2] *Ex parte* Mason, 105 U. S., 700; *Ex parte* Milligan, 4 Wallace, 123, 137, 138; *In re* Bogart, 2 Sawyer, 396; Trask *v.* Payne, 43 Barb., 569; In matter of Martin, 45 Id., 142; People *v.* Daniell, 6 Lansing, 49; Rawson *v.* Brown, 18 Maine, 216; Rawle, Const., 220; Whiting, War Powers, 553; 6 Opins. At. Gen., 425; 17 Id., 297.

[3] Providing that the Army should continue to be governed by the existing articles of war.

[4] See Rawson *v.* Brown and People *v.* Daniell, above cited.

THE NATURE OF THE COURT-MARTIAL AS A LEGAL TRIBUNAL.

Its Authorization in the Constitution. By Art. 1, sec. 8, of the Constitution, Congress, as we have seen, is invested with the power to *govern* the army, as well as the militia when employed in the public service, and is further authorized to make all laws which may be necessary and proper to carry such powers into execution. Under these powers Congress has from time to time enacted articles of war and other laws specifically providing for the institution of courts-martial.

The 5th Amendment of the Constitution, heretofore cited, which in effect provides that persons charged with crimes shall be proceeded against by indictment, &c., except in military or naval cases, has also sometimes been viewed as a source of authority for courts-martial. Thus Attorney General Cushing[1] observes of it that it "expressly excepts the trial of cases arising in the land or naval service from the ordinary provisions of law." And in the case, adjudged in New York, of Trask *v.* Payne,[2] the court say: "This provision practically withdraws the entire category of military offences from the cognizance of the civil magistrate and turns over the whole subject to be dealt with by the military tribunals." In the view of the author, the Amendment, in the particular indicated, is rather a *declaratory recognition and*

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[1] 6 Opins., 425.

[2] 43 Barb., 569. And see *Ex parte* Mason, 105 U. S., 700; Runkle *v.* U. S., 19 Ct. Cl., 397, 410; *In re* Esmond, 5 Mackay, 73-4.

sanction of an existing military jurisdiction than an original provision initiating such a jurisdiction.[1]

A further authority for the ordering of courts-martial has been held to be attached to the constitutional function of the President as Commander-in-chief, independently of legislation—as will be pointed out in the next Chapter.

Not a Part of the Judiciary but an Agency of the Executive Department. Courts-martial of the United States, although their legal sanction is no less than that of the federal courts, being equally with these authorized by the Constitution, are, unlike these, not a portion of the Judiciary of the United States, and are thus not included among the "inferior" courts which Congress "may from time to time ordain and establish." In the leading case on this subject, the Supreme Court, referring to the provisions of the Constitution authorizing Congress to provide for the government of the army, excepting military offences from the civil jurisdiction, and making the President commander-in-chief, observes as follows:—"These provisions show that Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practised by civilized nations, and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed that the two powers are entirely independent of each other."[2]

Not belonging to the judicial branch of the Government, it follows that courts-martial must pertain to the executive department; and they are in fact simply *instrumentalities of the executive power*, provided by Congress for the President as Commander-in-chief, to aid him in properly commanding the army and navy and enforcing discipline therein,[1] and utilized under his orders or those of his authorized military representatives.

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[1] In Runkle *v.* U. S., 19 Ct. Cl., 410, the court say of this Amendment that it is—"an express constitutional affirmation and preservation of the unlimited right of administration of military justice through military channels without the agency of grand jurors." And compare, as to a similar provision of the State Constitution, People *v.* Daniell, 50 N. Y., 275.

[2] Dynes *v.* Hoover, 20 Howard, 79. And see *Ex parte* Bright, 1 Utah, 154; Fugitive Slave Law Cases, 1 Blatchford, 635; People *v.* Daniell, 6 Lans., 44, 50 N. Y., 274; 1 Kent, Com., 341, note; also *Ex parte* Vallandigham, 1 Wallace, 253, where it is remarked by the court that the authority exercisable by a *military commission*, though "it involves discretion to examine, to decide and sentence," is not "judicial in the sense in which judicial power is granted to the courts of the United States." Compare Contested Election of Brig. Genl., 1 Strob., 198, cited *post.*

Thus indeed, strictly, a court-martial is not a *court* in the full sense of the term, or as the same is understood in the civil phraseology. It has no common-law powers whatever, but only such powers as are vested in it by express statute, or may be derived from military usage. None of the statutes governing the jurisdiction or procedure of the "courts of the United States" have any application to it;[2] nor is it embraced in the provisions of the VIth Amendment to the Constitution.[3] It is indeed a creature of *orders*, and except in so far as an independent discretion may be given it by statute, it is as much subject to the orders of a competent superior as is any military body or person.

A Temporary Summary Tribunal—Not a Court of Record. As a purely executive agency designed for military uses, called into existence by a military order and by a similar order dissolved when its purpose is accomplished,[4] the court-martial, as compared with the civil tribunals, is transient in its duration and summary in its action.[5] It is not, in a legal sense, a "court of record,"[1] and, unlike the superior courts of record, has no fixed place of session, no permanent office or clerk, no seal, no inherent authority to punish for contempt, no power to issue a writ or judicial mandate, and its judgment is simply a recommendation, not operative till approved by a revisory commander. It thus belongs to the class of minor courts of special and limited jurisdiction and scope, whose competency cannot be stretched by implication, in favor of whose acts no intendment can be made where their legality does not clearly appear, and which cannot transcend their authority without rendering their members trespassers and amenable to civil action.[2] But their proceedings, where no illegality is exhibited upon their face, will in general be presumed to be regular and valid.

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[1] Clode, 2 M. F., 361, says of these courts in the British law:—"It must never be lost sight of that the only legitimate object of military tribunals is to aid the Crown to maintain the discipline and government of the Army." And see Id., M. L., 91; Prendergast, 148.

[2] Thus it has been *held* that Sec. 848, R. S., (relating to witness fees,) and Secs. 866–870, R. S., (relating to depositions, &c.,) in the federal courts had no application to courts-martial. DIGEST, 107, 760.

[3] That is to say, the term—"criminal prosecutions" does not include proceedings before courts-martial.

[4] Mills *v.* Martin, 19 Johns., 33; Brooks *v.* Adams, 11 Pick., 442; Brooks *v.* Daniels, 22 Pick., 501; In the Matter of Wright, 34 How. Pr., 211; 3 Greenl. Ev., § 470. "These courts are not permanent, but created *pro hac vice*, i. e. for the trial of the particular offender." Clode, M. L., 58.

[5] "The discipline necessary to the efficiency of the army and navy required other and swifter modes of trial than are furnished by the common-law courts." *Ex parte* Milligan, 4 Wallace, 123. In Coleman *v.* Tennessee, 97 U. S., 513, the Court refer to the "swift and summary justice of a military court."

Compare the more permanent "Military Courts" established by Act of the Confederate States Congress, of Oct. 9, 1862, as given with amendments, in Appendix, XV.

Not Subject to Judicial Revision. Further, the court-martial being no part of the Judiciary of the nation, and no statute having placed it in legal relations therewith, its proceedings are not subject to be directly reviewed by any federal court, either by *certiorari*, writ of error, or otherwise, nor are its judgments or sentences subject to be appealed from to such tribunal. It is not only the highest but the only court by which a case of a military offence can be heard and determined; and a civil or criminal court of the United States has no more appellate jurisdiction over offences tried by a court-martial—no more authority to entertain a rehearing of a case tried by it, or to affirm or set aside its finding or sentence as such—than has a court of a foreign nation. In Dynes *v.* Hoover,[3] above cited, this principle is well illustrated by the Court in the declaration that a duly-confirmed sentence of a court-martial "is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever;" and further that with the legal sentences of competent courts-martial "civil courts have nothing to do, nor are they in any way alterable by them. If it were otherwise"—it is added—"the civil courts would virtually administer the rules and articles of war irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts." This ruling has been abundantly affirmed and illustrated in later cases.[1]

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[1] Chambers *v.* Jennings, 7 Mod., 125; *Ex parte* Watkins, 3 Peters, 209; Wilson *v.* John, 2 Binn., 215. The view expressed by Thring, (Criminal Law of the Navy, 103,) that a court-martial is a court of record and invested with the same power to punish for contempt as any common-law court, if applicable—which is questioned—to English naval courts martial, is certainly not law as applied to our courts-martial as governed by Art. 86.

[2] Runkle *v.* U. S., 122 U. S., 556; 19 Opins. At. Gen., 503. Upon the subject of the amenability of members of courts-martial to civil suit or prosecution, see Part III.

[3] 20 Howard, 81, 82.

In the recent case of Wales *v.* Whitney,[2] a proceeding instituted against the Secretary of the Navy for the discharge on *habeas corpus* of an officer of the navy, the Supreme Court of the United States, in holding that no federal tribunal "has any appellate jurisdiction over the naval court-martial nor over offences which such a court has power to try," adds that no such tribunal "is authorized to interfere with" a court martial "in the performance of its duty by way of a writ of prohibition[1] or any order of that nature."

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[1] "The Judiciary Act of 1789 gave the federal judiciary no such control, and none has been given since." Woolley's Case, Am. S. R., M. A., *v.* IV, p. 853. And see Porret's Case, Perry's Oriental Cases, 419; *Ex parte* Vallandigham, 1 Wallace, 243; *Ex parte* Milligan, 4 Do., 123; *In re* Grimley, 137 U. S., 147; *Ex parte* Reed, 100 U. S., 13, 23; *In re* White, 17 Fed., 724–5; *In re* Davison, 21 Fed., 618; *In re* Zimmerman, 30 Fed., 176; *In re* Spencer, 40 Fed., 149; Swaim *v.* U. S., 28 Ct. Cl., 173; *In re* Esmond, 5 Mackey, 64; Moore *v.* Houston, 3 S. & R., 197; State *v.* Davis, 1 South., 311; *Ex parte* Dunbar, 14 Mass., 393; Tyler *v.* Pomeroy, 8 Allen, 484; State *v.* Stevens, 2 McCord, 38; *Ex parte* Bright, 1 Utah, 148, 153; Whiting, War Powers, 278; Cooley, Prins. Const. Law, 113; 12 Opins. At. Gen., 332; Maltby, 151; also Wales *v.* Whitney and Smith *v.* Whitney, cited *post.*

In a few of the States the proceedings of *militia* courts-martial have been held to be subject, under the local law, to review by the civil courts of appeal. State *v.* Davis; Washburn *v.* Phillips, 2 Met., 296. But in the case of the Contested Election of Brig. Gen., 1 Strob., 198, the incongruity of a review of the proceedings of a court-martial by means of a writ of *certiorari* issued by a civil court is well illustrated as follows. After remarking that *certiorari* only lies to remove judicial acts, the court holds:—"The proceedings and sentences of courts military can hardly be considered judicial acts. * * * The very fact that the sentence of the court is not known until approved, then that the court is dissolved, and that the whole proceedings are in the possession of the officer ordering the court, show that the writ of *certiorari* cannot be awarded. For there is no one to whom it can go, and who can, as of and for the court, certify the proceedings. But that the Court of Sessions," (the civil court applied to for the writ,) "has no right to pronounce a *military judgment* upon the proceedings being up, is conclusive against the writ." But see the late case of *Ex parte* Thompson, 2 Quebec L. R., 115.

[2] 114 U. S., 564.

This ruling was presently affirmed in the case of Smith *v.* Whitney,[1] where a petition for a writ of *prohibition*[2] to the Secretary of the Navy and to a naval general court martial, to prohibit such court from trying a naval officer, was specifically refused by the same court. More recently the same writ has been refused in an army case by a U. S. Circuit court.[3] In a still more recent instance, (Johnson *v.* Sayre, April, 1895,)[4] the Supreme Court, in denying relief to a naval paymaster's clerk, convicted of embezzlement by a naval court-martial, declares, generally—"The court-martial having jurisdiction of the person and offence," and "having acted within scope of its legal powers, its decision and sentence cannot be reviewed or set aside by the civil courts by writ of habeas corpus or otherwise."

Prohibition and Certiorari in England. In England, indeed, where all courts derive their original authority from the Sovereign as the "fountain of justice,"[5] and a relation, unknown to our law, exists between civil and military tribunals, a power to review the proceedings and sentences of courts-martial appears to have been at one time specifically recognized by the Mutiny Act as possessed by the superior courts of common law.[6] No such provision, however, was contained in the later Acts, and none such is to be found in the present statute law. But, independently of statute, it has been held that writs of *prohibition* and of *certiorari* may legally issue out of the High Court of Justice to courts-martial; *prohibition*, to forbid the court to proceed on the ground that it is without authority or jurisdiction; and *certiorari*, to require it to certify up the record with a view to the quashing of conviction or sentence if found illegal.[7] It was also held, however, that the former writ would not be granted on account merely of irregularities or informalities in the proceedings of the court-martial, or of an erroneous decision on the merits,[1] or after the sentence had been executed, or because the sentence was excessive;[2] and that *certiorari* was a proper remedy only where the rights of the party affected by the judgment of the court-martial were *civil* rights, and the court had acted without jurisdiction,—that the writ would not issue where the rights affected were of a military character, *i. e.*, such as are attached to military rank or status.[3] And it is a noticeable fact that the British courts have never granted *either* of these writs in a case tried or on trial by court-martial.

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[1] 116 U. S., 168. The writ had been first refused in this case by the Supreme Court of the District of Columbia. See 4 Mackey, 535.

[2] A writ of prohibition is a means resorted to to prevent the doing of an act not yet performed or completed. U. S. *v.* Hoffman, 4 Wallace, 158.

[3] U. S. *v.* Maney, U. S. C. C., 61 Fed., 140. (May, 1894.)

[4] 158 U. S., 109.

[5] 1 Black. Com., 266; 2 Stephen, Com., 538; Broom, Const. Law, 145.

[6] Tytler, 167; 1 Opins. At. Gen., 236.

[7] Manual, 151, 153; Grant *v.* Gould, 2 H. Black., 69; *In re* Mansergh, 1 Best & Smith, 400 Clode, M. L., 158.

No appeal, as such, to Congress. It may be remarked here that while Congress is of course empowered to legislate at discretion for the relief of any person deemed to have suffered unjustly or too much from the sentence of a court-martial, it can have no authority whatever to entertain an appeal as such from the judgment of such a court, or to set aside or revise its proceedings. The point would scarcely be noticed except for the reason that it has been, in early cases, the subject of rulings in Congress itself. Thus in the Report of the Committee on Military Affairs of the House of Representatives, in 1826, in the case of Col. T. Chambers, 1st artillery,[4] it was said that the Committee "disclaimed any idea of countenancing or entertaining an appeal from the decision of military courts to this House—a practice which would be subversive of discipline and highly injurious to the service." In the later case of Lt. Col. Woolley, in 1832,[5] the same Committee observes in its report—"Congress are not authorized to revise or to reverse the judgment of any tribunal, civil or military."

Cognizance collaterally, on Habeas Corpus. While courts-martial, not being "inferior courts" to the Supreme Court under the Constitution, cannot be appealed from to any civil court, or controlled or directed by the decree or mandate of such a court, yet in our U. S. Courts, similarly as in the English tribunals, the writ of *habeas corpus* may be availed of by a prisoner claiming to be illegally detained under trial or sentence of court-martial, and in this proceeding the legality of the action of the court—as whether it was legally constituted, or had jurisdiction, or its sentence was authorized by the code—may be inquired into.[1] But the action must have been absolutely illegal and void in law to induce the federal court[2] to grant relief,[3] for a civil tribunal will not go into the merits of, or try, a military cause.[4]

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[1] Grant *v.* Gould, *ante.*

[2] *In re* Poe, 5 Barn. & Adol., 681; Prendergast, 202. In the more recent (Irish) case of Sergt. McCarthy, 14 W. R., 918, it was held that "a prohibition will not issue merely because the evidence given in support of a military charge discloses a higher civil offence."

[3] *In re* Mansergh, *ante;* Capt. Roberts' Case, Manual, 154.

[4] Am. S. R., M. A., vol. III, p. 327.

[5] Am. S. R., M. A., vol. IV, p. 853.

So, in a case before the Court of Claims,[5] or an ordinary civil court, where the right to recover pay, &c., depends upon the legality of the proceedings of a court-martial, the question whether the court has transcended its authority may be passed upon. So, such question may be tried in an action for damages for false imprisonment under sentence.[6] But these *collateral* methods of reviewing the action of military courts have not been frequent in practice, since it is well established that the civil judicature will not interfere in any case in which the court, however irregular may have been its proceedings, has acted or is acting within its legal jurisdiction and powers.[1]

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[1] *In re* Grimley, 137 U. S., 150.

[2] It need hardly be observed that a *State* court could have no jurisdiction in such a class of cases. See PART III.

[3] In *Ex parte* Mason, 105 U. S., 697, the Supreme Court, in holding that it "has no power to review the judgments of courts-martial," adds that it cannot, upon *habeas corpus*, discharge a person under sentence of court-martial, "if the court had jurisdiction to try the offender for the offence with which he was charged, and the sentence was one which the court could, under the law, pronounce." In *Ex parte* Reed, 100 U. S., 23, the same court well say:—"A writ of *habeas corpus* cannot be made to perform the functions of a writ of error. To warrant the discharge of the petitioner, the sentence under which he is held must be not merely erroneous and voidable but absolutely void." And see *Ex parte* Parks, 93 U. S., 18; Barrett *v.* Hopkins, 2 McCrary, 129; King *v.* Suddis, 1 East, 306. In Wales *v.* Whitney, 114 U. S., 575, it is remarked that, even where the court-martial had in fact no jurisdiction, the power of the civil tribunal, on *habeas corpus*, "extends no further than to release the prisoner. It cannot remit a fine, or restore to an office, or reverse the judgment of the military court." But it is further held in this case that an officer merely in arrest at large, *i. e.*, under an arrest confining him to the limits of the City of Washington, was not under such physical restraint as to be a subject of discharge on *habeas corpus*.

[4] In the matter of Corbett, 9 Benedict, 277.

[5] See Keyes *v.* U. S., 15 Ct. Cl., 553, and 109 U. S., 336; Wales *v.* Whitney, 114 U. S., 575; Swaim *v.* U. S., 28 Ct. Cl., 217.

[6] See PART III; also Wales *v.* Whitney, *ante*.

It may be noted that the law is similarly held by the authorities in the kindred class of cases in which the petitioner for the writ of *habeas corpus* has not yet been tried or arraigned but is detained in military custody with a view to trial. If the person and the offence are within the jurisdiction of the proposed court-martial, the civil federal court will not enter into the merits of the charge, but will leave the same to be tried by the military tribunal and remand the prisoner.[2]

Mere errors of procedure not revisable on habeas corpus. That mere errors of procedure, not affecting the jurisdiction, or authority to sentence, of the court, are not to be regarded by a United States civil court, in its collateral inquiry, has been frequently noticed by the authorities. Thus, in *In re* Grimley, the Supreme Court say—"It is clear that by *habeas corpus* the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial, and that no mere errors in their proceedings are open to consideration."[3]

The only real appeal. In the British practice substantially the only court of appeal from the judgments of courts-martial may be said to be the Judge Advocate General, a civil official and member of the Government representing the Sovereign in the administration of military justice.[4] So, with us, an Accused has always an appeal, from a conviction and sentence by court-martial, to the President, (or Secretary of War,) who, in entertaining and determining such appeal, is assisted and advised by the Judge Advocate General of the Army.[1] Thus, as the tribunal is an *executive* agency, the appeal therefrom is to a superior *executive* authority.

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[1] Barrett *v.* Crane, 16 Vt., 246; Brown *v.* Wadsworth, 15 Id., 170; Keyes *v.* U. S., 109 U. S., 336; Barrett *v.* Hopkins, 7 Fed., 312; *In re* Davison, 21 Fed., 618. "The single inquiry, the test, is jurisdiction." *In re* Grimley, 137 U. S., 150.

[2] *In re* Bogart, 2 Sawyer, 396; *In re* White, 9 Id., 49; *In re* McVey, 23 Fed., 878.

[3] 137 U. S., 150. And see Smith *v.* Whitney, 116 U. S., 168; U. S. *v.* Fletcher, 148 U. S., 92; *In re* White, 17 Fed., 725; *In re* Davison, 21 Fed., 621; *In re* McVey, 23 Fed., 879; Swaim *v.* U. S., 28 Ct., Cl., 217. And see Grant *v.* Gould, 2 H. Bl., 107.

[4] "The Judge Advocate General's Department forms a Court of Appeal, and therefore takes no part in the actual preparation, conduct, or management of prosecutions." Jones, (1881,) p. 63.. "The Judge

Conclusiveness of Judgments of Court-Martial. Not being subject to be reversed or appealed from, the judgment of a court-martial of the United States is, within its scope, absolutely final and conclusive.[2] Its sentence, if *per se* legal, cannot, after it has received the necessary official approval, be revoked or set aside; and it is only by the exercise of the pardoning power that it can—provided it be not as yet *executed*—be rendered in whole or in part inoperative.[3]

A Court of Law and Justice. Notwithstanding that the court-martial is only an instrumentality of the executive power having no relation or connection, in law, with the judicial establishments of the country, it is yet, so far as it is a court at all, and within its field of action, as fully a court of law and justice as is any civil tribunal. As a court of law, it is bound, like any court,

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Advocate General and his Deputy form a sort of *final court*, which has the power of upsetting, or 'quashing,' all court-martial proceedings." Gorham, (1880,) p. 37.

[1] Congress, "in addition to courts for trial, has provided a separate and complete line of reviewing authorities, terminating in the Executive." *In re* Esmond, 5 Mackay, 74 [That the Judge Advocate General, under the authority vested in him by Sec. 1199, R. S., to receive, *revise*," &c., the proceedings of courts-martial has of course no power to *reverse* a finding and sentence, was ruled in Mason's Case, U. S. Circ. Ct., No. Dist. N. Y., October, 1882.]

[2] "Within the sphere of their jurisdiction the judgments and sentences of courts-martial are as final and conclusive as those of civil tribunals of last resort." Hoffman, J., in *In re* McVey, 23 Fed., 878. And see 11 Opins. At. Gen., 139; 17 Id., 297; 18 Id., 21; *Ex parte* Reed, 100 U. S., 13; *In re* Esmond, 5 Mackey, 64; *In re* Davison, 21 Fed., 620; Warden *v.* Bailey, 4 Taunt., 76; Frear *v.* Marshall, 4 F. & F., 485; Dynes *v.* Hoover, 20 Howard, 83; *Ex parte* Reed, 10 Otto, 13; *In re* Bogart, 2 Sawyer, 396; Moore *v.* Houston, 3 S. & R., 197; Brown *v.* Wadsworth, 15 Vt., 170; People *v.* Van Allen, 55 N. Y., 36; State *v.* Stevens, 2 McCord, 38; *Ex parte* Bright, 1 Utah, 145; Porret's Case, Perry, 419.

[3] DIGEST, 551, 552, 557, 701. And see under NINETY NINTH ARTICLE, in Chapter XXV.

by the fundamental principles of law, and, in the absence of special provision on the subject in the military code, it observes in general the rules of evidence as adopted in the common-law courts.[1] As a court of justice, it is required, by the terms of its statutory oath, (Art. 84,) to adjudicate between the United States and the accused "without partiality, favor, or affection," and according, not only to the laws and customs of the service, but to its "conscience," *i. e.* its sense of substantial right and justice unaffected by technicalities. In the words of the Attorney General, courts-martial are thus, "in the strictest sense courts of justice."[2]

A Court of Honor. A court-martial has been called a "court of honor," and this designation, though less employed than formerly, is still applicable to it, for the reason that it punishes dishonorable conduct where the same affects the reputation or discipline of the army.[3] It may try an officer for not being also a gentleman—a dereliction not cognizable by any other species of tribunal. But though in this a court of *honor*, it is at the same time a court of *law*, since it proceeds against such conduct as an offence to be charged and proved according to the rules of criminal pleading and evidence.

As assimilated to a Civil Judge and Jury. As illustrating the function of a court-martial to administer law and justice, it may be noted that this court, though an "exceptional forum,"[4] is not without close analogies in its *personnel* to the ordinary civil tribunals. Thus it has frequently been compared, as to some of its powers and proceedings, to a *judge*, and as to others to a *jury*.[5] Indeed, in its taking of a statutory oath, its being subject to challenge, its hearing and weighing of evidence, its finding of guilt or innocence, and its liability to be reassembled to reconsider its verdict, it nearly resembles a traverse jury in a criminal court. On the other hand, in its arraignment of the accused, its entertaining of special pleas to its jurisdiction or competency as a court and objections to the sufficiency of the pleadings and the admission of testimony, its authority to grant continuances and to adjourn, and its power to impose sentence, it is more closely assimilated to the judge. The further comparison by Atty. Gen. Cushing[1] of a court-martial to a "*grand jury*," in that its members are "changeable in numbers and personality within certain limits," is a much less obvious analogy.

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[1] See Chapter XVIII—EVIDENCE.

[2] 11 Opins., 138.

[3] "In military life there is a higher code termed *honor* which holds its society to stricter accountability; and it is not desirable that the standard of the Army shall come down to the requirements of a criminal code." Nott, J., in Fletcher *v.* U. S., 26 Ct. Cl., 563.

[4] 6 Opins. At. Gen., 204.

[5] Sullivan, 17; Adye, 167; Tytler, 221; 1 McArthur, 274: Delafons, 121; Hough, 944; Simmons, § 637; Griffiths, 168; Harcourt, 128; McNaghten, 117, 122, 124, 127; Bombay R., 30; Macomb, 31; 3 Opins. At. Gen., 398; 5 Id., 707; 6 Id., 206; 7 Id., 340; 10 Id., 65. "The verdict of a jury bears a close analogy to the judgment of a court-martial." 19 Id., 107.

A Criminal Court. In regard to the class of courts to which it belongs, it is lastly to be noted that the court-martial is strictly a criminal court.[2] It has in fact no civil jurisdiction whatever; cannot enforce a contract, collect a debt, or award damages in favor of an individual. All fines and forfeitures which it decrees accrue to the United States. Even where it tries and convicts an accused for an offence involved in an obligation incurred or injury done to another person, whether a military person or a civilian—as in the case of an officer guilty of dishonorable conduct in the non-payment of private debts, or in that of a soldier who has stolen from a comrade or trespassed upon a citizen—it cannot adjudge that the debt be paid, that the property be returned, or that its pecuniary value or the amount of the damage, be made good to the party aggrieved. Its judgment is a criminal sentence, not a civil verdict: its proper function is to award *punishment* upon the ascertainment of guilt.[3]

The nature and characteristics of the Court-Martial will be abundantly illustrated as we proceed with the details of its powers and practice.

The Different Kinds of Courts-Martial. As has already been perceived, there are now, in our military law, five species of courts-martial, to wit—1. A superior or highest court known as the General Court-Martial; 2. The Regimental Court-Martial; 3. The Garrison Court-Martial; 4. The Field Officer's Court; 5. The Summary Court. The first three have been specifically authorized in our Articles of War from the beginning. The fourth, a court for time of war only, was established by an enactment of July 17, 1862, incorporated in the Code of Articles of 1874. The last is a court authorized for time of peace by an Act of October 1, 1890. The four courts last-named, which may be designated as the *Inferior* courts-martial, will be treated of in a separate Chapter.[1]

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[1] 7 Opins., 340.

[2] DIGEST, 321-2; U. S. *v.* Clarke, 96 U. S., 40; "The crimes or misdemeanors forbidden by the Articles of War are offences against the United States." 19 Opins. At. Gen., 106.

[3] DIGEST, 322; 3 Greenl. Ev § 469, 471, 476; Warden *v.* Bailey, 4 Taunt., 78.

The *General Court-Martial*, much the most important of our military tribunals, will now be considered with respect to its Constitution, its Composition, its Jurisdiction, and its Procedure.

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[1] There is no such court recognized in our law or practice as the "Drum Head Court-Martial." With us, summary justice is done, in peace, through the Summary Court; in war, mostly through the Field Officer's Court and the Military Commission.

In our Navy the only trial courts are two in number—the General Court-Martial and the Summary Court.

The courts-martial of the Militia of the District of Columbia, (whose proceedings are required to conform to those of the courts-martial of the Army,) consist of—(1) General Courts-Martial, ordered by the Brig.-General commanding, and (2) Battalion Courts-Martial, and (3) Company Courts-Martial, ordered, respectively, by commanders of battalions and companies. [Act of March 1, 1889, c. 328, s. 51–54.] It may be remarked here that the authority for and legal status of the District militia are not clear. It is no part of the militia referred to in the Constitution, (Art. I., sec. 8 §15, 16,) which evidently contemplates a militia of the *States*. It would appear to have been created as a species of military police, in the exercise of the power of "exclusive legislation" conferred upon Congress by § 17 of the same section, similarly as such a police might perhaps be provided for a Territory under Art. IV., section 3.

CHAPTER VI.

THE CONSTITUTION OF GENERAL COURTS-MARTIAL.

THE law authorizing and relating to the constituting of General Courts-Martial is contained in the provision of the Constitution making the President the Commander-in-chief of the Army, in the Seventy-Second and Seventy-Third Articles of war, and in Secs. 1230 and 1326 of the Revised Statutes. By this law the authority to constitute these courts is vested in—I, The President; II, Certain military commanders.

I. AUTHORITY OF THE PRESIDENT TO CONSTITUTE GENERAL COURTS-MARTIAL.

The President is empowered to institute courts-martial—1st, as Commander-in-chief under the Constitution; 2d, in the special contingency indicated in the 72d Article; 3d, in the particular cases provided for by Sec. 1230, Rev. Sts.

1. **As Commander-in-chief.** The 72d Article of War, (as amended by the Act of July 5, 1884,) which provides for the convening of general courts-martial in the army, is as follows—"Art. 72. Any general officer commanding an army, a Territorial Division, or a Department, or colonel commanding a separate Department, may appoint general courts-martial whenever necessary. But when any such commander is the accuser or prosecutor of any officer under his command the court shall be appointed by the President; and its proceedings and sentence shall be sent directly to the Secretary of War, by whom they shall be laid before the President, for his approval or orders in the case."

This Article, (unlike the corresponding article of the naval code,[1]) does not expressly designate the President as one of the officials invested with a general authority to order general courts-martial, but declares that the same may be convened by certain military commanders, *except* in a certain specified contingency, (hereafter to be defined,) when—it is provided—the court shall be ordered by the President. And it has been argued, on the principle—assumed to be applicable—of *expressio unius exclusio alterius*, that the President was thus legally empowered to exercise the authority in question only in the cases embraced in the exception.

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[1] See Rev. Sts., Sec. 1624, Art. 38.

But as the law is now generally held, and in the opinion of the author, the President is invested with a general and discretionary power to order statutory courts-martial for the army, *by virtue of his constitutional capacity as Commander-in-chief, independently of any article of war or other legislation of Congress.* In this view the 72d Article is construed simply as an enabling statute, indicating what military commanders "may," for the purpose of discipline, (and to relieve, while representing, the Commander-in-chief,) "appoint" [1] such courts; the exception expressed in the second clause being regarded as a recognition of and reference to the President, as the source of military command, for the purposes of the exercise by him in person of the authority in a particular class of cases where his subordinate cannot justly or properly act. As if the Article had said that while the commanders designated might convene these courts for their commands in cases in general, yet in the instances specially excepted recurrence must be had to the original power residing in the Commander-in-chief.

Original authority of British Sovereign to convene courts-martial. By the common and statute law of Great Britain down to the period of the first Mutiny Act, the King was vested with the supreme command and government of the army, a function which necessarily included the power to constitute courts-martial.[2] Nor, in the author's opinion, was this power, exercised from an early period, divested by the Mutiny Act of 1869.[1] This Act did not assume in terms to authorize the Crown to convene military courts in general, but, in view of the emergency which had induced its enactment, while condemning the exercise of martial law and the arbitrary infliction of the penalty of death, it made special provision for the assembling of such courts by "their Majestyes," &c., for the trial, within the Kingdom, and punishment capitally if found necessary, of three offences of particular gravity, which, in time of peace at least, in the absence of such provision, would legally have been punishable, or punishable with death, within the realm, only by the civil courts.[2] That the Act was not intended to impair, and in fact left intact, the original function of the Sovereign to order courts-martial for the trial of military offences, seems to be the soundest conclusion, and such is apparently the conclusion of Samuel,[3] the principal of the earlier, and Clode,[4] one of the most recent, of the commentators on the Mutiny Act. That this is the proper view is confirmed by the consideration that in the larger measure of its exercise, *viz.* in respect to the constituting of courts-martial outside the Kingdom, and for the trial of offences other than mutiny, sedition, and desertion within the Kingdom,

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[1] The amended Article has recurred to the form of expression employed in the code of 1806. The form in the Article of 1874, before the amendment, was—"shall be competent to appoint." It may be observed that the antiquated term *appoint*, still retained in the Article, is not often used in practice; such equivalent forms as order, convene, assemble, detail and constitute being employed, indifferently, instead.

[2] See Samuel, 34, 53, 55, 64, 65, 134. The extent of this power, as

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understood at the time, appears from the well-known statue of 13 & 14 Car., 2, "passed," in the words of an English writer, (Law Mag., vol. XIV., (1835,) p. 4,) "for settling all disputes on this important subject," of which the preamble runs as follows: "Forasmuch as within all his majesty's realms and dominions, the sole and supreme power, government, command, and disposition of the militia, and of all the forces both by sea and land, and of all forts and places of strength, is and by the laws of England ever was, the undoubted right of his majesty and his predecessors, kings and queens of England; and that both, or either, of the houses of parliament cannot and ought not to pretend to the same," &c. This prerogative, observes Samuel, (writing in 1816,) is "as complete at this day as in precedent times;" and, as illustrating the same, he declares that—"as connected with the fulness of the kingly authority over the military state, to the Crown it has always belonged to make laws or ordinances for the economy, discipline and government of the army, *and to appoint and erect tribunals for the administration and enforcement of them throughout the same.*" (pp. 53, 162.)

[1] See Samuel, 162, 163.

[2] See Clode, M. L., 19, 91.

[3] Page 163.

[4] M. L., 91, 92. On my reading this passage to Mr. Clode in person, he assured me that I had not misapprehended his view.

this branch of the prerogative remained for a long period acquiesced in and acknowledged by the Legislature.[1] Later Acts which recited that it "shall be lawful" for the Sovereign to institute courts-martial generally, should, it is believed, properly be regarded as mainly of a *declaratory* effect.[2]

Law and practice as to the exercise of the authority by the President. In this country, prior to the adoption of the Constitution, Congress, which exercised the entire power of the government, executive as well as legislative, while itself expressly directing the institution of military courts in some cases,[3] in general devolved the authority for this purpose upon the commander-in-chief of the army and the generals commanding in the separate States.[4] To the *latter* this authority was expressly delegated by Congress, by resolution of April 14, 1777,[5] but it is noticeable that the authority, as ascribed to and exercised by the *commander-in-chief*, rested upon no express grant, but was apparently derived mainly by implication from the terms of Washington's commission by which he was vested with "full power and authority to act as he should think fit for the good and welfare of the service," and enjoined to cause "strict discipline and order to be observed in the army."[6] Considerably later, in the Articles of 1786, the authority was in terms vested in "the general or officer commanding the troops."

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[1] See Simmons § 2; Clode, M. L., 21; Samuel, 203.

[2] The provision of the existing British "Army Act," in regard to the authority to convene general courts-martial, *viz.*, "A general court-martial shall be convened by Her Majesty, or some officer deriving authority immediately or mediately from Her Majesty,"—certainly seems to be declaratory of a prerogative of the Crown in this particular.

[3] See 1 Jour. Cong., 329, 427. In some instances the direction was given to the Board of War or Navy Boards, or the "Secretary at War." 2 Jour., 517; 3 Do,, 26, 686; 4 Do., 44.

[4] 2 Jour., 242, 243, 281, 431; 3 Do., 244.

[5] The codes of articles of 1775 and 1776, though conferring, respectively, upon "the general or commander-in-chief" the power to pardon or mitigate punishments, and the power to act upon sentences, omitted to make provision for the *convening* of general courts.

[6] The commission in full, as "agreed to" by Congress, is given in 1 Journals, 85. That the powers here conferred were regarded as including authority to order military courts is evident from a letter from Washington to Maj. Gen. Gates, of Feb. 14, 1778, (Sparks' Writings of Washington, vol. 5, p. 236,) in which, in expressing the opinion that the power of appointing such courts was "too limited," he observes—"I do not find it can legally be exercised by any officer except the commander-in-chief or the commanding general in any par-

Upon the adoption of the Constitution and the division of the powers of the government, the executive power, previously exercised by Congress, was transferred to the President, and with it the function of commander-in-chief. This function was not defined by the Constitution. To it therefore were properly to be regarded as attached, (with such modifications as the new form of the government required,) the powers originally vested in Congress and delegated by it as above indicated to the commander-in-chief of its army, and which had been exercised by the latter up to this period. Among these powers was the authority, properly incident to chief command, of issuing to subordinates and the army at large such *orders* as a due consideration for military discipline might require, and, among these, orders directing officers to assemble and investigate cases of misconduct and recommend punishments therefor—in other words orders constituting courts-martial. The Constitution had indeed vested in the new Congress the power to legislate for the regulation and government of the army, but this provision could not rightly be regarded as *per se* militating against the exercise of an authority properly inhering in a function devolved by the same instrument upon the Executive, and which had been attached to that function by the previously-existing law and usage.[1]

That the right of the Commander-in-chief to exercise this power was not seriously questioned would appear from the practice of the early Presidents by whom it was exercised in most important cases.[2] Subsequent Presidents employed the same authority from time to time, both in peace and in war,[3] and dur-

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ticular State." The subsequent resolution of Congress, of April 10, 1782, 4 Journals, 8,)—"That the Secretary of War shall, in the absence of the commander-in-chief, be empowered to order the holding of general courts-martial in the places where Congress may be assembled"—is a legislative recognition of the existence of the power in the commander.

[1] Among the principal cases in which the courts were ordered by Washington as Commander-in-chief, were those of Gens. Arnold, Lee, Schuyler and St. Clair, Cols. Graham and Zedwitz and Lt. Col. Enos.

[2] As in those of Brig. Gen. Hull and Maj. Gens. Wilkinson and Gaines, tried in 1813–1816.

[3] As in the cases of Gens. Talcott and Twiggs, Col. Sumner, Lt. Col. Montgomery, and Majors Crittenden and Cross.

ing the late civil war it was repeatedly resorted to and in conspicuous instances.[1]

Meanwhile, indeed, the provision of 1830, now incorporated in the second clause of the 72d Article, had specially devolved it upon the President to appoint the court whenever the military commander, otherwise competent for the purpose, should happen to be the "accuser or prosecutor" of the officer to be tried; but the effect of this, according to recent ruling,[2] was "to limit the authority of commanding officers, not to confer power upon the President." And the authority of the President to order such courts, generally and at discretion, *as commander-in-chief*, continued to be exercised irrespective of such provision. Otherwise indeed it would have resulted that many officers and soldiers, not under the command of a "department" or "army" commander, including general officers, certain officers of the general staff, cadets of the Military Academy, and sundry enlisted men of the Engineer Battalion, or Ordnance or Signal corps, or acting as clerks in the War Department, would, prior to 1874, (or, in the case of the cadets, 1873,) have remained exempt from amenability to military justice, to the serious prejudice of discipline.

The enactments of 1873 and 1874, enabling the Superintendent of the Military Academy and the General of the Army to convene general courts, have reduced in number the occasions for the exercise of this power by the Commander-in-chief, but the same is still asserted in proper cases and has been resorted to in recent important instances.[3]

The authority in question, however, does not rest wholly upon executive practice and precedent. The legality of its exercise was affirmed by the Military Committee of the House of Representatives in Lt. Col. Woolley's Case in 1832,[1] and had also been asserted by Maltby,[2] Macomb[3] and De Hart,[4] in their treatises. Later writers on military law have adopted the same view,[5] and the same was also declared by distinguished department and army commanders in Orders, during the late war.[6] Further, in the leading case of Major Runkle, where the point was specifically raised, it was held by Judge Advocate General Holt in 1872 that the convening of the court by the President in his capacity of commander-in-chief was a legal act;[7] and this opinion, adopted by the Secretary of War at the time, was subsequently sustained by the Attorney General[8] and also by the Judiciary Committee of the Senate in reports of March 3, 1879 and February 18, 1885, and by the Court of Claims in April, 1884.[9]

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[1] As in the cases of Brig. Gens. Hammond, Gordon and Paine.

[2] Swaim *v.* U. S., 28 Ct. Cl., 223.

[3] As in those of Cadet J. C. Whitaker, (Dec., 1880;) Major J. H. Taylor, (Aug., 1882;) Brig. Gen. Swaim and Lieut. Col. Morrow, (June, 1884;) Brig. Gen. Hazen, (March, 1885;) Major G. J. Lydecker, (March, 1889;) Capt. G. A. Armes, (April, 1889;) Lieut. J. A. Swift, (May, 1890;) Capt. A. E. Miltimore and three other officers, (May, 1890;) Colonel C. E. Compton, (June, 1891;) Major C. B. Throckmorton, (Nov., 1891;) Major L. C. Overman, (Dec., 1891;) Capt. W. S. Johnson, (March, 1893;) Lieut. W. M. Williams, (May, 1893;) Capt. D. F. Stiles, (Oct., 1893;) Lieut. Jas. A. Maney, (May, 1894;) Capt. W. S. Johnson, (Aug., 1894;) Lieut. J. V. S. Paddock, (Jan., 1895.)

More recently, (February, 1893) the power in question has been again maintained by the Court of Claims in Gen. Swaim's case,[10] where it is ascribed not only to the fact that the President is Commander-in-chief and so invested therewith *ex officio*, but also to the fact that a general power given by a statute to a subordinate is given necessarily to the superior, since the greater, in the system of military discipline and authority, must contain the less. Upon the latter point the Court say—"It seems evident then to the court that as courts-martial are expressly authorized by law, and the authority to convene them is expressly granted to military officers, this power is necessarily vested in the President by statute, though it may not be inherent in his office. A military officer can not be invested with greater authority by Congress than the Commander-in-chief, and a power of command devolved by statute on an officer of the Army or Navy is necessarily shared by the President. * * * * * * It is said that courts-martial are the creatures of statute law. But so also are regiments. There can be no standing army without statutory authority. Congress may place the command of a regiment in a colonel, a lieutenant-colonel, a major, or any other officer, but when Congress so enact they, without words to that effect, likewise place the command in the Commander-in-chief. His name is to be understood as written in every statute which confers upon a military officer military authority."

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[1] Am. State Papers, Mil. Affairs, vol. 4, p. 854.

[2] Pages, 18, 142, 146, 147.

[3] Edit. of 1809, p. 8; edit. of 1841, p. 13

[4] Pages 5, 6.

[5] Coppée 11; Lee 86–7; Ives, 30.

[6] G. C. M. O. 12, Army of the Potomac, 1864, (Gen. Meade;) G. O. 48, Dept. of the Cumberland, 1864, (Gen. Thomas;) Do. 27, Dept. of the N. West, 1864, (Gen. Pope;) Do. 160, Dept. of the Ohio, 1863, (Gen. Burnside;) Circ., Dept. & Army of the Tenn., Jan. 16, 1865, (Gen. Howard.)

[7] DIGEST, 81, 605–6.

[8] 15 Opins., 302–3, *note*. The author's previously prepared MS. on the subject under consideration was furnished to the officer of the Dept. of Justice by whom this *note* was drawn.

[9] Runkle *v.* U. S., 19 Ct. Cl., 396. It is significant that the Supreme Court, in their consideration of this case on appeal, (122 U. S., 543,) make no reference to the initial question of the authority of the President to order the court, thus impliedly concurring in the view of the Court of Claims on this point.

[10] 28 Ct. Cl., 173, 221, 224.

Thus resting upon law, authority and precedent, the power of the President to order general courts-martial may well be regarded as no longer open to serious question.[1]

2. Under the 72d Article of War. In the second clause of this Article it is provided that when a military commander, authorized by the first clause to "appoint" a general court-martial, is the "*accuser or prosecutor*" of an officer of his command proposed to be brought to trial, the court shall be appointed by the President.[2]

This provision was introduced into our military law by an Act of May 29, 1830, as an amendment to the 65th article of the then existing code. The amendment has been held, as we have seen, to be "plainly restrictive of the preceding legislation," *i. e.* the article prior to 1830; its effect being not to add to the authority of the President but to detract from that of the commanders designated.[3]

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[1] The form of its exercise is generally an order issued by the Commanding General of the Army, "*by direction of the President.*" See the S. O., Headquarters of the Army. Or the order may be issued through the Secretary of War. G. O. 35, War Dept., 1850.

[2] It may be noted that this provision does not apply to trials of *enlisted men*, also that, equally with a similar provision of the succeeding (73d) article, it does not apply to trials by inferior courts. *On principle*, however, it should be applied to such courts where it can be done "without serious embarrassment to the service." DIGEST, 84. In a case in G. O. 11, Dept. of Texas, 1866, it was applied to a trial by *military commission*.

[3] Swaim *v.* U. S., 28 Ct. Cl., 223.

Its purpose clearly was to debar a superior from selecting the court for the prosecution and trial of a junior under his command, and, as reviewing authority, passing upon the proceedings of such trial, or executing the punishment, if any, awarded him, in a case where, by reason of having preferred the charge or undertaken personally to pursue it, he might be biased against the accused, if indeed he had not already prejudged his case.[1] The article wholly divests such superior of power to order the court, "nor could such power be imparted to him otherwise than by a special legislative act."[2]

Construction of terms "accuser" and "prosecutor." As indicated by the use of the disjunctive "or," these terms are evidently intended to bear a somewhat different signification. To distinguish therefore the two designations—"*accuser*" is construed to mean one who either originates the charge or adopts and becomes responsible for it; "*prosecutor*" one who proposes or undertakes to have it tried and proved. It is not essential that the accuser or the prosecutor should be the principal, or what is sometimes termed the "prosecuting" witness, or indeed that he should be a witness at all. The characters of accuser and prosecutor, though distinct, may be united in the same person: indeed, where a commander is in fact the "accuser," he will, in the majority of cases, be found to be also the true prosecutor.

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[1] "The object of this provision is just and beneficial. It is intended to prevent the packing of a court, and still more perhaps to prevent the suspicion of such packing." O'Brien, 227. And see G. O. 11, Dept. of the Ohio, 1866; also the opinion of the At. Gen. in case of Capt. Coleman, (17 Opins., 436,) where it is held that if the convening commander was accuser or prosecutor, the court was "illegally constituted, and the findings and sentence consequently void."

The occasion of this legislation was the trial of Col. R. Jones, Adjutant General, by a court convened by Maj. Gen. Macomb, then commanding the Army, who preferred the charges, was the prosecuting witness, and was also the reviewing authority who approved the sentence. See the proceedings published in G. O. 9 of March 13, 1830.

In the present practice, where a court-martial is ordered by the President, not as Commander-in-chief, but in compliance with this statute, the Order specifies in terms that it is made "under the 72d Article of War," or to that effect. See instances in S. O. 98, 114, 118, 244, of 1876; 79 Id., of 1877; 3 Id., 1878; 250, 257 Id., 1879; 88 Id., 1880, but such cases are infrequent.

[2] Capt. Coleman's case, *ante*.

Whether a commander who has taken action in the case of an officer of his command proposed to be tried,—as by ordering his arrest, preferring or directing the preferring of charges, or approving charges as preferred, &c.,—is to be considered as an accuser or prosecutor in the sense of this Article, so as to disqualify him from ordering the court and to make it necessary for the President to do so, is a question depending mainly upon the relation and *animus* of such commander toward the accused or the case. Where his action has been merely *official*, the capacity indicated cannot in general properly be ascribed to him. Thus, where, upon the facts of the supposed offence being reported to him, and appearing to call for investigation by court-martial, he has, *as commander*, directed some proper officer, as the commander of the regiment or company of the accused, or his own staff judge advocate, to prepare the charges, (indicating or not their form,) or has approved or revised charges already prepared, he is not to be regarded as an "accuser" in the sense of the Article, his action having been official and in the strict line of his duty. Nor is he to be deemed a "prosecutor" merely for the reason that, having personal cognizance of the facts of the case, he contemplates being a material and important witness on the trial.[1]

On the other hand, where, having personally originated or adopted the charges, he has himself preferred them as his own, or caused them to be preferred nominally by another for him,[2] with the purpose of having them brought to trial, he is in general properly the "accuser," even if he may occupy no hostile or adverse position toward the accused. So, if, influenced by hostile feeling, or by a conviction that the accused is guilty and that his offence demands to be promptly and efficiently dealt with, he proposes, upon assembling the court, actively to promote the prosecution, as by instructing the judge advocate, facilitating the attendance of witnesses for the prosecution, appearing himself as prosecuting witness, &c., he is properly to be deemed a "prosecutor" within the meaning of the Article, and it will not be legal for him to order the court, but the President must be resorted to for the purpose.

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[1] Compare DIGEST, 83; G. O., 25, Dept. of Fla., 1866, (remarks of Gen. Foster;) 16 Opins. At. Gen., 106.

[2] See case in G O. 11, Dept. of the Ohio, 1866.

It may be remarked that the action of the commander, to have disqualified him from convening the court, must have been taken by him *of his own will*, and not merely ministerially and in compliance with orders. Thus where a commander, by the direction or at the instance of the President or other official superior, has caused a subordinate to be arrested and charges to be preferred against him, and thereupon assembled a court for his trial, the proceedings or sentence of such court can not be called in question under the Article.[1]

Procedure under this part of the Article. The same facts and considerations which are pertinent to the inquiry as to the attitude of the commander toward the case *before* a court has been ordered, are equally so when, the court having been assembled, the accused is arraigned, or at any subsequent stage of the proceedings.[2] In the majority of cases, the issue upon the point, whether the commander who convened the court was or not the accuser or prosecutor of the accused, has been raised by the accused either at the trial, or subsequently before the reviewing authority and especially before the President. Regularly, indeed, where the accused is informed as to the action, and *animus* of the commander in the case, he should properly take the objection at the arraignment; but as the constituting of a court-martial in contravention of the prohibition of the Article necessarily nullifies its proceedings *ab initio*, the question of the legality of a court claimed to have been thus constituted may be raised at any time during the trial or within a reasonable interval thereafter.[3]

The exception being taken at the trial, the original charge, as preferred and signed, will be significant evidence. If this, however, is not forthcoming, or does not, (as it more frequently will not,) exhibit the precise relation of the commander to the case, other evidence relevant to this relation may be introduced, as upon the trial of any other issue. The accused, if necessary, may even call upon the commander himself to be sworn and examined.

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[1] DIGEST, 83.

[2] DIGEST, 84. And see 16 Opins. At. Gen., 106.

[3] Compare the case in 16 Opins., 106. The right of the accused to know whether the convening commander may not be the accuser or prosecutor in the case was recognized on Gen. Porter's trial. Printed Record, p. 10-11.

The authority exclusive in the President. In view of the positive provision that, in the event of the contingency specified in the Article, the court is to be ordered by the President, it would scarcely be worth while to notice that no *intermediate* commander could exercise this authority, were it not for the fact that this point has actually been passed upon by the Secretary of War. This was in the case of Capt. Mackenzie, who was brought to trial, in July, 1845, before a general court-martial, which, the charges having been preferred by the department commander, was ordered by Brig. Gen. Wool, commanding the "Eastern Division." The question of the authority of the latter, under the circumstances, having been submitted to Mr. Marcy, then Secretary of War, he of course decided that the order of the Division commander was illegal, and dissolved the court.[1]

3. Under Sec. 1230, Rev. Sts. This Section is as follows: —"*When any officer, dismissed by order of the President, makes, in writing, an application for trial, setting forth, under oath, that he has been wrongfully dismissed, the President shall, as soon as the necessities of the service may permit, convene a court-martial, to try such officer on the charges on which he shall have been dismissed. And, if a court-martial is not so convened within six months from the presentation of such application for trial, or if such court, being convened, does not award dismissal or death as the punishment of such officer, the order of dismissal by the President shall be void.*"

This provision was originally enacted in s. 12 of the Act of March 3, 1865, c. 79—a date when the war was still pending and the President was empowered to summarily dismiss officers of the army. In this form the statute applied, in terms, to officers "who may be hereafter dismissed," *i. e.* after its date; and it has been held, successively, by the Judge Advocate General and the Solicitor General[2] that the fact that the word "hereafter," or some equivalent term, was not employed in the provision, as incorporated in the Rev. Sts., did not extend the application of such provision, or give it a retroactive effect so that an officer who had been dismissed in 1863 could be allowed a trial under it.

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[1] This case is referred to by De Hart, p. 7, and note.

[2] DIGEST, 373; 16 Opins. At. Gen., 599.

It is further evident that, under the existing law—Sec. 1229, Rev. Sts., and the 99th Art. of war—which prohibits summary dismissals of officers by the President in time of peace, the Section under consideration is operative and available only in time of war, or in cases of officers dismissed in war.[1]

It has been held by the Judge Advocate General,[2] in whose opinion the Attorney General has since concurred,[3] that officers *dropped for desertion* under Sec. 1229, Rev. Sts., were not of the class of dismissed officers contemplated by Sec. 1230, and so not entitled to apply for a trial under the latter statute.

The Section is incomplete in that it fails to prescribe a limit of time within which the application for a trial shall be made. It can thus only be said that it should be made within a reasonable time,[4] and what is a reasonable time will of course depend upon the circumstances of the particular case. If not made within a reasonable time, the officer will be deemed to have acquiesced in his dismissal and waived his right to the trial.[5]

The Section, moreover, does not prescribe as to the *contents* of the application, except that the applicant shall set forth therein "that he has been wrongfully and unjustly dismissed." In practice, applications which merely followed this form of words, without specifying in what the alleged wrong or injustice was claimed to consist, have been accepted as sufficient. A more specific statement, however, would be preferable.[1]

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[1] For the few cases in which officers availed themselves of this statute at the end of the late war, see G. C. M. O. 539, 568, 636, 637, of 1865; Do. 118 of 1866. In one of these cases the officer was re-dismissed; in one he was awarded a punishment less than dismissal, *viz.*, forfeiture of pay, and the original dismissal was accordingly declared void; in the other three he was acquitted, with a like result.

[2] DIGEST, 374.

[3] 17 Opins., 13.

[4] So held by the Judge Advocate General, (DIGEST, 373;) the Attorney General, (17 Opins., 13;) and the Court of Claims, (18 R., 435,) —in Lieut. Newton's Case, in which also the opinions above cited were mostly given. The Atty. Genl. observes, (17 Opins., 20,)—"It is not reasonable to wait until the statute of limitations has run against the offence, witnesses have disappeared, and memory failed, or until we may naturally expect these things to have occurred." In the same case the Court of Claims, p. 444, say—"The claimant waited nine years before making his application. During all this time he did not report himself to the Department, neither rendered nor offered to render any service, made no claim to the office or its pay, and now gives no good reason for his long silence. Under these circumstances, in our opinion, the law should presume acquiescence."

[5] Newton *v.* U. S., 18 Ct. Cl., 444, *ante*.

It is to be observed, as a further peculiarity, that a court-martial ordered under this Section differs from all other courts-martial in that, if it fails to impose one of the sentences indicated in the Section, its judgment takes effect without the approval of the convening authority. If it acquits the party, or does not sentence him to death or to be dismissed, his original dismissal is by such action vacated instanter and he is restored to the army, and the approval or disapproval of the President can affect in no manner this result.

Constitutionality of the statute. This statute has thus far been viewed as constitutional, but its constitutionality may well be questioned. The Attorney General indeed has passed upon this question,[2] holding the Section to be within the power of Congress to legislate for the government and discipline of the army, and not to be "obnoxious to the objection that it invades or frustrates the power of the President to dismiss an officer. On the contrary," he adds, "it proceeds upon an admission that the power of dismissal belongs to the President. It is simply a regulation which is to follow a dismissal, providing in certain contingencies for the restoration of the officer to the service, and leaving the dismissal in full force if those contingencies do not happen." But the power of dismissal can hardly be deemed substantial if thus liable to be nullified at any time within an indefinite period, and moreover a statute which authorizes a court-martial not only to try a civilian, but practically to appoint him to the army, is certainly subject to serious question.[3]

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[1] See DIGEST, 373. In the regulations referred to in a previous note it is directed that the application shall set forth, under oath, "facts showing the error or injustice complained of."

[2] 12 Opins., 4.

[3] See Digest, 373, note.

II. AUTHORITY OF MILITARY COMMANDERS TO CONSTITUTE GENERAL COURTS-MARTIAL.

This authority is conferred by the 72d and 73d Articles of war, and Sec. 1326, Rev. Sts.

1. Under the 72d Article. This Article, as has been seen, provides that—"*Any general officer commanding an army, a territorial division or a department, or colonel commanding a separate department, may appoint*[1] *general courts-martial whenever necessary.*"

"General officer commanding an army." The corresponding term of description employed in the Article of 1874, of which the above is a recent amendment, was—"Any general officer commanding the Army of the United States, a separate army, or," &c. Upon comparing the two forms, it is quite evident that the designation "an army" was employed as a single and comprehensive term intended to include both the Army as a whole and any lesser or separate "army"—in other words the two sorts of armies indicated in the original 72d Article. Under the present provision, therefore, a general court-martial may be ordered—1st, by the general officer assigned by the President to command the Army of the United States,[2] (and, in practice, such courts are now frequently ordered by such commanding general); 2d, by any general commanding a body of forces organized and designated by the President for special military purposes as an "army." Such would properly be a body distinct and complete within itself, and not existing as an integral portion of some larger component part of the Army, but acting independently under its own commander, subject only to the direction of the Commander-in-chief, or the General-in-chief of the Army. Such an "army" would scarcely be constituted except in time of war; and of the species of army contemplated the Army of the Potomac, Army of the Tennessee, Army of Virginia, &c., as organized in the late war, were instances.

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[1] The proper significance of the term "appoint," as meaning the same as *order* or *convene*, has been referred to in a previous note.

[2] Under a similar term in the corresponding article, (the 65th,) of 1806, the different generals commanding the Army, as Gens. Dearborn, Brown, Macomb and Scott, convened, from time to time, general courts-martial.

"A territorial division or a department"—"A separate department." The terms "division" and "department," as here employed, refer to the geographical or territorial commands, fixed and designated in General Orders, into which the public domain is commonly divided for military purposes by the orders of the President.[1] Such were heretofore the Divisions of the Missouri, of the Atlantic and of the Pacific;[2] and are now (1895) the Departments of the East, the Missouri, Texas, Dakota, the Platte, California, the Columbia and the Colorado. The term "Division" is thus distinguished from the same word as employed in a purely military sense in the next (73d) Article, and the term Department from the same name as attached to the corps of the General Staff.[3] A general commanding both a Division and a Department, (as do the Commanders of the Divisions of the Atlantic and the Pacific,) is empowered to order a general court-martial in either of his capacities. A colonel commanding a department would not be empowered to order such a court as Division Commander even if temporarily assigned to the command of the Division.[4] To make the court legal, the convening officer must of course be a department, &c., commander *at the date of the convening order.*[1]

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[1] As to the meaning of the term "department," see Parker *v.* U. S., 1 Peters, 293; also 2 Opins. At. Gen., 355, where it is held that the word as used alone, (*i. e.*, without the word "territorial" or like description,) in the 65th Article of 1806, meant geographical department. Compare Art. XXIX., A. R.—"Military Geographical Divisions and Departments."

[2] The Division commands were, for the time, discontinued, by G. O. 57 of July 3, 1891.

[3] That "department," as employed in the corresponding article of 1806, included a staff department, or at least the "Engineer Department," was claimed at an early period by the Chief of Engineers. See Order, Hdqrs. Engr. Dept., Washington, July 23, 1818, promulgating proceedings in cases of Pvt. B. Moss and others, Company of Bombardiers, Sappers and Miners, tried by a general court-martial convened by the Chief of Engineers at West Point, with remarks of Brig. Gen. J. G. Swift, C. E. This view was not tenable after the ruling of the Supreme Court in Parker *v.* U. S., *ante*, and was abandoned. It has recently, (July, 1894,) been *held* by the Actg. Judge Advocate General that the Chief of Engineers was not authorized to grant a leave of absence, as a *department commander*.

[4] A *brevet* general, assigned, (under Sec. 1211, Rev. Sts., as amended by the Act of March 3, 1883,) to command a Division or Department

Delegation of the authority. As the Article expressly designates certain particular commanders as competent to order general courts for armies, divisions and departments, it follows, upon the principle of *expressio unius exclusio alterius*, that no other commanders or officers shall be so authorized. A commander of a division, department or army cannot therefore delegate to an inferior commander or to a staff officer the authority vested in himself by this Article, or authorize such officer to exercise the same, *for him*, in his temporary absence or otherwise.[2]

Scope of the authority. It is of course to be understood that the authority, conferred by the article upon division, department and army commanders as such, extends only to the conven-

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according to his brevet rank, would be invested with the command and powers of a full general under this Article, and otherwise. See 17 Opins. At. Gen., 39.

[1] In an early case, (1813,) where the court had been convened by an officer who was not a department commander, and its proceedings were therefore illegal, it was *held* that the President could not make them legal by declaring the command to be a department command *after* the trial and sentence of dismissal. Case of Lieut. J. D. Cobb, Am. S. P., M. A., vol. IV, p. 82. This officer, having thus been dismissed by an illegal court, was subsequently rehabilitated, with full pay for the interval, by the authority of a special Act of Congress. Do., p. 854.

[2] DIGEST, 82; Circ., No. 2, (H. A.,) 1892. As to the effect of the absence of the commander from his command, see *post.*

The practice was at one time very general in our Army for department or army commanders, in detailing general courts, to authorize or instruct the commander of the post at which the court was to be held, to fill up such vacancies as might occur in the detail, through absence, &c., with officers of his command selected by himself. See, for example, G. O. as late as of Aug. 24 and Sept. 23, 1841. In some cases the president only, or two or three members, were named by the superior, and the inferior was directed to add the rest. See G. O. 14 of 1832; Do. 33 of 1838; also Do. (without number,) of April 11, 1838. In a few cases the order for the court designated a certain post commander as president, and directed him to detail the other members from his command. See, for example, G. O. 60, of 1835. It need hardly be said that all such orders were in contravention of law, and upon the revision by the Secretary of War of Capt. Trenor's case, (G. O. 71 of Nov. 18, 1841,) in which the practice was condemned, the same was finally discontinued.

ing of courts for the trial of officers and men *of their own command.*

Suspension of the authority by absence, &c. It further follows from the terms of the Article that the general officer or colonel must be in the exercise of his command when the court is ordered, to make the order a legal one. While the mere fact alone[1] that, when issuing the order, he was absent from his command—as where, in pursuing hostile Indians, he had temporarily passed the boundaries of his department,[1] or where he had temporarily left it on official business—would not properly be deemed to affect the legality of the order,[2] the result would be otherwise where the absence was such as, by military law or usage, to *detach* him from his command. Thus, where a division or department commander is absent for any considerable period from his command by reason of having received and taken advantage of a leave of absence,[3] or of having been placed by superior authority upon some distinct and separate military duty,—as the duty of sitting as a member of a court or board at a distance from his department,—his authority under the 72d Article will, during the period of such absence, strictly and properly be regarded as *suspended*, even if no other officer be assigned to command in his place.[4]

In such cases indeed the same power that has originally assigned the officer to his command, the President, may *specially*

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[1] Compare 16 Opins. At. Gen., 678.

[2] See Circ. No. 8, (H. A.,) 1886.

[3] The principle that the effect of the status of being on leave of absence is to detach the officer from the command or duty held or exercised at the time of entering upon the leave, is illustrated. in 1 Opins. At. Gen., 181; 7 Id., 161; 13 Id., 526, 527; U. S. *v.* Williamson, 23 Wallace, 415. And see the definition of soldiers "in the line of duty," as excluding those "at the time on furlough or leave of absence," in J. R. of April 12, 1866. In 13 Opins., 527, the Atty. Gen. says:—to have "no post or duty * * * is the case, for the time being, of an officer on leave."

[4] See G. C. M. O. 26 of 1878; Do. 9, Dept. of Columbia, 1880. The "decision of the Executive" referred to in the former of these Orders was a ruling, (in concurrence with an opinion of the Judge Advocate General,) that a department commander, who had duly convened a certain general court-martial, was not authorized to take action upon and approve its proceedings and sentence, when absent from his command and the department, on a leave of absence.

order that, during his absence or detaching duty, he shall continue to exercise his division or department command as if he were present; and under such an order he would continue to be authorized to convene general courts therefor. But, in practice, wherever such a commander has been for any time detached from his command, the President has almost invariably at once assigned some other officer to exercise the command in his absence.

Discretion, in general, of commander under the Article. Under the conditions indicated, and subject to the general law of the service, the power vested in the commander by the Article is *complete* and *exclusive*. The President indeed, as Commander-in-chief, may direct him to order a court in a particular case; and the exercise of his authority must of course be governed by the statute of limitations, (Art. 103.) But, in general, it is entirely within his discretion to determine, in each instance, whether a court shall be ordered at all, or, if ordered, when and where, (within the command,) it shall be convened. As to *place*, the commander, being informed of the stations and status of the officers of his command· available for court-martial duty, (and having in view the general provision on the subject, of the 76th Article,) will readily select the locality at which any particular court may be assembled with the most convenience to the service and the least expense to the United States.[1]

2. Under the 73d Article. This article is as follows:—"*In time of war the commander of a division, or of a separate brigade of troops, shall be competent to appoint a general court-martial. But when such commander is the accuser or prosecutor of any person under his command, the court shall be appointed by the next higher commander.*"

Operation of the Article. This statute, of which the original form was contained in the Act, passed early in the late war, of December 24, 1861, made its first appearance as an Article of war in the revised code of 1874.[2] As a provision for time of war only, it certainly ceased to be operative after August 20, 1866, the date of the conclusion of the *status belli* throughout the United

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[1] G. O. 9 of 1892.

[2] Other provisions of this Act are incorporated in Arts. 105, 107 and 112.

States;[1] and in several cases the proceedings of courts convened under it in 1866, subsequently to that date, were declared void in Orders.[2]

Division and brigade commands. In our law a brigade properly consists of at least two regiments of infantry or cavalry, and a division of at least two brigades; and the "commander" indicated in the Article will regularly be, of the former a brigadier general, and of the latter a major general.[3] It is not, however, essential that he should be such, or even a general officer. A colonel or officer of less rank may, in war, become, for the time, by virtue of seniority, the commander of a brigade or a division, and as such empowered to exercise the authority devolved by this Article. Except indeed in war, divisions and brigades are not formed in our army.[4]

Meaning of "separate brigade." By this term is evidently meant a brigade which is not a component part of any division, but is operating by itself, and of which the commander reports directly to the commander of the corps, army, or department, or to the General commanding the Army or the Commander-in-chief.[5] After the passage of the Act of 1861, the original of Art. 73, it was found that officers sometimes assumed to convene general courts as commanders of "separate" brigades, when their commands were not *separate* in the evident sense of the Article, but were embraced in division commands,[6] or were small or mixed commands not properly amounting to or constituting brigades.[7] The latter was peculiarly the case with the commands known as "districts." With a view of defining the subject, there was issued from the War Department, in August, 1864, a General Order, which, under the heading of "Courts-Martial for Separate Brigades," prescribed as follows:—"*Where a post or district command is composed of mixed troops, equivalent to a brigade, the commanding officer of the Department or Army will designate it in orders as "a separate brigade," and a copy of such orders will accompany the proceedings of any General Court-Martial convened by such brigade commander. Without such authority, commanders of posts and districts having no brigade organization will not convene General Courts-Martial.*"

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[1] The Protector, 12 Wallace 702.

[2] G. O. 68, Dept. of Washington, 1866; Do. 7, Dept. of the Potomac, 1866; Do. 24, Dept. of the Mo., 1866.

[3] Sec. 1114, Rev. Sts. See *ante* as to the difference between the term "division" as here used and as used in the preceding Article.

[4] Par. 188, Army Regs.

[5] DIGEST, 85.

[6] In G. O. 299 of 1863, the proceedings were set aside and the sentence held inoperative in a case tried by a general court convened by the commanding officer of the "2d Brigade, 3d Division, 14th Army Corps," *i. e.*, of a brigade which was a component of a division and so not "*separate.*" And see G. O. 246 of the same year; also DIGEST, 85.

[7] See case in G. O. 14, Dept. of the Platte, 1866.

The rulings of the Judge Advocate General in construing this Order are set forth in the Digest of Opinions.[1]

The Article under consideration concludes with the provision that, when a commander, authorized by the article to order a general court, "is the accuser or prosecutor of any person under his command, the court shall be appointed by the next higher commander." What has been said under the previous Article as to the purport of the terms "accuser" and "prosecutor" will in substance be applicable here. The "next higher commander," in our military organization in time of war, will ordinarily be the commander of the "army in the field to which the division or brigade belongs." It is this commander whose confirmation is made by Art. 107 necessary to the execution of sentences of dismissal adjudged by division and separate brigade courts-martial.

3. Under Sec. 1326, Rev. Sts. This statute declares that: "*The Superintendent of the Mititary Academy shall have power to convene general courts-martial for the trial of cadets, and to execute the sentences of such courts, except the sentences of suspension and dismission, subject to the same limitations and conditions now existing as to other general courts-martial.*"

This is an enactment of March 3, 1873, and is properly an article of war. The "Superintendent" indicated is the officer invested, by Sec. 1311, Rev. Sts., with the "immediate government and military command" of the Academy and of the military post of West Point. The above provision is sufficiently clearly expressed,[1] and no serious question as to its construction is known to have been raised. The "limitations and conditions" which it refers to are the following, viz: (1) that sentences of dismissal or suspension, imposed upon cadets by courts-martial convened by the Superintendent, can become operative only through the order of the President given for their execution, upon the formal confirmation by him of the same, after the approval thereof by the Superintendent; (2) that where the Superintendent is the "accuser" or "prosecutor" of a cadet whose trial is contemplated, recourse must be had to the President for the ordering of the court, as in the analogous case of the "officer" referred to in the 2d clause of Art. 72.

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[1] Pages 86–87. See also G. C. M. O. 43, of 1865, where it was held that the officer commanding the "Kanawha Valley Forces" was not authorized to order a general court; also G. O. 48, Northern Dept., 1865, where it was similarly held of the commander of a Draft Rendezvous.

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[1] It would have been more complete had the words *approve the proceedings and* been inserted before the word "execute." That the Superintendent shall approve before executing is however of course to be understood.

CHAPTER VII.

THE COMPOSITION OF GENERAL COURTS-MARTIAL.

THIS subject is regulated by the 75th, 77th, 78th and 79th Articles of War, and Sec. 1658, Rev. Sts. It will be considered under the heads of—I. Class and Rank of Members; II. Number of Members.

I. CLASS AND RANK OF MEMBERS.

They must be Commissioned Officers.—*Art. 75.* This Article provides that—"*General courts-martial may consist of * * * officers;*" i. e. that officers alone shall be competent to sit on such courts. Sec. 1342, Rev. Sts., by which the code of Articles is prefaced, declares that "the word officer as used therein shall be understood to designate *commissioned* officers." Commissioned officers only therefore may compose general courts.[1] The detailing of non-commissioned officers or soldiers, where the accused is of one of these grades, with commissioned officers, on courts-martial, which is required by some of the European codes,[2] has never been authorized by our law.

General Rule of Eligibility. The term "officers" not being limited or qualified by the Article, (Art. 75,) it follows that *all* commissioned officers of the army, of whatever rank, and whether or not having *command*, are, (except where specifically excluded by express enactment,) eligible to be detailed as members of general courts. Officers on the retired list are so excluded by Sec. 1259, Rev. Sts.;[1] but they are the only class thus excepted. All other commissioned officers, *i. e.* all officers on the active list having military rank,[2] whether officers of the line or staff, may legally sit as members;[3] and although staff officers are detailed as such less frequently than line officers, there is, in our present limited army, no department or branch of the staff, (other than the Judge Advocate General's department,)[4] which is not more or less frequently represented on courts-martial, except only chaplains.[5] The officers detailed must all of course be within the command of the convening commander.[6]

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[1] The law is the same as to inferior courts. See Arts. 80–82.

[2] See the author's Translation of the German Military Code, p. 16—note, and authorities cited. The French Code de Justice Militaire, § 10, directs that one *sous-officier*, (non-commissioned officer,) shall sit on courts for the trial of non-commissioned officers and soldiers.

Who are Commissioned Officers. These are officers who have duly received and accepted commissions appointing them, (or rather evidencing their appointment,) to *offices* in the army. A commission may be permanent or temporary; that is to say it may evidence an appointment made by the President and confirmed by the Senate, or merely an appointment of the class authorized, by Art. II., Sec. 2 § 3, of the Constitution, to be conferred by the President during a recess of the Senate, to "expire at the end of their next session," and also called "commissions" in the Constitution.[7] Thus an officer holding a commission of the latter description, is, while it remains in force, as eligible to be assigned to duty on a court-martial as is any officer who has received the more formal and permanent commission issued upon the confirmation of his appointment by the Senate. So, the tenure, as to duration, of the office conferred by the commission cannot affect the eligibility of the officer for court-martial service. Thus a commissioned officer of volunteers, though the tenure of his office may be limited to a comparatively brief period, is no less eligible for such service.[1]

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[1] See, in this connection, 19 Opins. At. Gen., 500.

[2] See *post*—"Professors."

[3] Subject of course to objection under Art. 88. It may be remarked that officers known or believed to be liable to challenge will not properly be detailed upon courts-martial.

[4] This for the reason that the duties of the officers of this department include the reviewing of and reporting upon the proceedings of trials, and because they are not unfrequently required to be utilized as judge-advocates in important cases.

[5] Chaplains, being commissioned officers with the rank of captain, are as *legally eligible* for court-martial duty as any other officers of the army. Their detail however has been expressly discountenanced by the Secretary of War. Circ., Dept. of Cal., June 8, 1875.

[6] See par. 189, Army Regulations. The classes of officers specified in par. 190, A. R., though within the territorial department, are not within the command of the department commander. See Circ., No. 13, (H. A.,) 1891.

[7] See 18 Opins. At. Gen., 28, 29; 19 Do., 261; O'Shea *v.* U. S., 28 Ct. Cl., 392. Reference may well be made in this connection to the definition of the term "officer of the United States" as set forth by the Supreme Court in U. S. *v.* Germaine, 99 U. S., 508, and U. S. *v.* Monatt, 124 U. S., 307.

The appointment of a Cadet is not a commission in the military sense.[2] He is therefore not a commissioned officer, and not eligible to act as a member of any court-martial.[3]

"Acting" Officers. It need hardly be added that persons "*acting*," (by the authority of military orders,) as officers, or for and in the stead of officers, but who are not legally appointed or commissioned as such, are, though effectively performing all the duties which would devolve upon officers of the army under similar circumstances, clearly not officers within the meaning of the present Article, or qualified to sit upon courts-martial. Thus an "acting assistant," or "contract" surgeon, not being an officer of the army, but a civil official, is not so qualified,[4] and would not be so even though serving with an army in the field and thus subject to military discipline. Nor, for a similar reason, would a civilian, acting as a volunteer aid on the staff of a general in the field, or a non-commissioned officer acting as a commissioned officer, be thus eligible.

"Officers" implies Rank.—*Professors.* It is clearly contemplated by the laws and regulations governing the service that members of courts-martial shall have relative military rank. Thus Art. 79 provides that an officer shall not in general be tried by officers inferior to him in rank; so the Army Regulations, pars. 878, 879, 881, direct as to the order of the naming of the members in the detail and their precedence on the court and as to the selection by seniority of the president. The term "officers," as employed in Art. 75, must therefore be deemed to imply *rank;* and as all commissioned officers, with a single exception, of the present military establishment have military rank, it follows that the excepted officers referred to cannot legally be ordered to sit on courts-martial. These are the Professors of the Military Academy, who, though made by Sec. 1094, Rev. Sts., a part of the army, and appointed by the President and confirmed by the Senate as public officers, yet have no military rank. That they were not eligible to detail upon courts-martial, because having no rank "lineal or assimilated," was held by Attorney General Wirt in 1821.[1] More recently they have been described by Attorney General Brewster as "commissioned officers of the army," who "in pay and allowances are *assimilated* to the rank of colonel and lieutenant-colonel."[2] In this category, however, is not included the Professor of Law, who is an officer of the army temporarily detailed in this capacity,[3] and is therefore legally eligible as member or judge-advocate of a general court-martial.

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[1] See 10 Opins. At. Gen., 522–3.

[2] He is held by the Court of Claims, (Babbitt *v.* U. S., 16 Ct. Cl., 203,) to be of the class of "inferior officers," indicated in the Constitution, (Art. II., Sec. 2,) as appointed but not commissioned. See Collins *v.* U. S., 14 Ct. Cl., 569.

[3] 1 Opins. At. Gen., 469; 2 Id., 251; 7 Id., 323.

[4] DIGEST, 144; Byrnes *v.* U. S., 26 Ct. Cl., 302.

Relative Rank of Members.—*Art. 79.* This Article, with a view to the excluding, as far as reasonably practicable, from courts-martial, officers who as junior to the accused may have an interest in procuring him to be dismissed, suspended, &c., provides that—"*No officer shall, when it can be avoided, be tried by officers inferior to him in rank.*" This provision, (like that of the 75th article in reference to the *number* of the court, presently to be considered,) is regarded as not prohibitory but directory only upon the convening commander. Its effect is understood to be to leave to the discretion of that officer, as the conclusive authority and judge, the determining of the question of the rank of the members, with only the general instruction that superiors or equals in rank to the accused shall be selected, so far as the exigencies and interests of the service may permit. Such was, early in the recent war, the construction given to the provision by Judge Advocate General Holt,[4] and this construction, adopted by other authorities,[1] has been recently finally established in the case of Mullan *v.* U. S.,[2] where it was held by the Supreme Court, affirming the judgment of the Court of Claims,[3] that, in the instance of a court-martial of the navy, (whose code in this respect is similar to that of the army,) composed of seven members, five of whom were junior in rank to the accused, it was to be presumed that the detailing of such a proportion of junior officers could not "be avoided without injury to the service," and that the legality of the proceedings of the court was not affected thereby. Thus, that an officer is inferior in rank or grade to the accused does not render him incompetent to sit as a member of a military court-martial,[4] or subject him as such member to challenge.[5] Nor would it affect the validity of the proceedings that *all* the members were junior to the accused.

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[1] 1 Opins., 469.

[2] 17 Opins., 359.

[3] Under the Acts of June 6, 1874, and June 1, 1880.

[4] DIGEST, 89.

In practice, in our service, courts for the trial of general officers have almost invariably, if not necessarily, comprised members junior to the accused; in time of *peace* indeed, it would rarely be practicable to assemble even a *minimum* court of equals or superiors in rank for the trial of a general officer of one of the higher grades.[6] Upon courts for the trial of officers of the lower degrees the direction of the Article has been more nearly observed. There have indeed been frequent departures from the rule, prompted doubtless in general by a due consideration for the convenience and economy of the service. Such exceptions, however, *if reasonably avoidable*, are in contravention of the letter of the law, and should not be too freely sanctioned.

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[1] See Trial of Capt. D. Porter of the navy, (1825,) p. 20; G. C. M. O. 7, Dept. of the Platte, 1880; Wooley *v.* U. S., 20 Law Rep., 631; also case cited in note 4, *post.*

That the phrase, "*when it can be avoided,*" in Art. 79, has practically the same meaning as the clause of Art. 75, that general courts "*shall not consist of less than 13 when that number can be convened without manifest injury to the service,*" is illustrated by the provision in the *naval article,* (No. 39,) corresponding to that of Art. 79, viz:—"*where it can be avoided without injury to the service;*" this expression combining in effect the two forms employed in the articles of war.

[2] 140 U. S., 240.

[3] 23 Ct. Cl., 34.

[4] In Lieut. Armstrong's case it was held by the Attorney General, (17 Opins., 397,) that the fact that a member, *not objected to on the trial,* would (and did) become advanced in his grade by the dismissal of accused, did not render him incompetent, or affect the validity of the proceedings.

[5] See Trial of Capt. Porter above cited; also, generally, under EIGHTY-EIGHTH ARTICLE in Chapter XIV.

[6] On some of the principal trials of general officers in our army, the rank of the members of the court was as follows: Maj. Gen. Chas. Lee, (1778,)—1 maj. gen., 4 brig. gens., 8 cols.; Maj. Gen. Arnold, (1779,)—1 maj. gen., 3 brig. gens., 9 cols.; Brig. Gen. Hull, (1813,)—1 maj. gen., 1 brig. gen., 4 cols., 7 lieut. cols.; Maj. Gen. Wilkin-

Competency of Certain Classes of Officers in Certain Cases—*Regulars, as distinguished from volunteers, militia, &c.—Art. 77.* This article declares that—"*Officers of the regular army shall not be competent to sit on courts-martial to try the officers and soldiers of other forces, except as provided in Art. 78*,"—next to be considered. By "regular army" is to be understood the permanent military establishment, as especially distinguished from *volunteers*, or *militia* in the federal service. These two contingents—volunteers and militia—are indeed quite distinct from each other; the former, as will be further illustrated in the next Chapter, being, for the time, equally with the regulars, a part of the Army of the United States, while the latter, though in the employment of the nation, are State troops.[1] But in view of the comprehensive and general term, "officers and soldiers of *other forces*," the Article has been construed as disqualifying regular officers from acting as members of courts-mar-

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son, (1814,)—2 maj. gens., 3 brig. gens., 7 cols., 1 lieut. col.; Maj. Gen. Gaines, (1816,)—1 maj. gen., 3 brig. gens., 3 cols., 6 lieut. cols.; Bvt. Maj. Gen. Twiggs, (1858,)—3 bvt. maj. gens., 2 bvt. brig. gens., 5 cols., 2 bvt. cols., 5 lieut. cols.; Maj. Gen. Porter, (1862,)—2 maj. gens., 7 brig. gens.; Brig. Gen. Hammond, (1864,)—1 maj. gen., 8 brig. gens.; Brig. Gen. Swaim, (1884,)—1 maj. gen., 5 brig. gens., 7 cols.; Brig. Gen. Hazen, (1885,)—2 maj. gens., 8 brig. gens., 3 cols.

The court for the trial of Marshal Bazaine, (1873,) consisted of ten generals, no marshals being at the time available. That by which the "Emperor" Maximilian and his generals Miramon and Mejia were tried and sentenced to death, at Queretaro, Mexico, June 13–14, 1867, was composed of one lieut. col. (president,) and six captains.

[1] Art. 1, Sec. 8 § 16 of the Constitution. In some cases during the late war volunteers were confounded with militia, and it was held that, under the then existing Art. 97, a regular officer could not legally be detailed on a court for the trial of volunteers. G. O. 53, Dept. of the East, 1864; Do. 16, Dept. of the Mo., 1864; G. C. M. O. 11, 13, 16, Dept. of Ky., 1865. While this construction is believed to have been incorrect, it can scarcely be questioned that the present Art. 77—a much clearer and more precise provision—is to be interpreted as indicated in the text.

tial for the trial of any officers or soldiers not of the regular army, whether volunteers, militia, drafted men, or any other persons except the class of *marines* designated in the next article.

Thus a court composed entirely of regular officers cannot legally be ordered for the trial of an officer or soldier of another military force; nor, where such a court has been once duly created for the trial of a regular or regulars, is it qualified to proceed to the trial of a volunteer, &c., if brought before it for trial. And where the court is not entirely but only partially so composed, even if it comprises five officers of another force eligible for the particular trial, it cannot legally proceed to such trial.

Volunteers, &c., as eligible for trial of regulars. It may be noted that while regular officers are thus precluded by Art. 77 from trying offenders belonging to the other branches of the public military force, our code contains no converse provision that regulars shall not be tried by courts composed of officers of the other contingents—militia or volunteers—of a mixed national army. In the absence of any such provision during the late war, officers of volunteers were not unfrequently detailed as members of courts-martial for the trial of regular officers and soldiers; their competency to take part in such trials having been at an early date affirmed by the Judge Advocate General. Officers of militia called forth and engaged in the public service would have been equally competent. And—the law remaining unchanged—militia and volunteer officers will of course be similarly competent, when serving with regulars in the future; as will also militia officers be competent to sit upon trials of volunteers.[1]

Regulars and Marines associated.—*Art. 78.* This article provides that: "*Officers of the marine corps, detached for service with the army by order of the President, may be associated with officers of the regular army on courts-martial for the trial of offenders belonging to the regular army, or to forces of the marine corps so detached.*" The nature and capacity of that amphibious branch of the public service known as the Marines, as a kind of connecting link between the army and the navy, is illustrated in this Article. This corps, under the earlier legislation in regard to it,[1] had occupied an undefined position.[2] The Act of June 30, 1834, however, while assimiliating it to the army in respect to organization, discipline and pay, permanently attached it to the naval establishment for administrative and jurisdictional purposes,[3] and is now classed as a part of the navy in the Revised Statutes. The Act of 1834 contained a provision, now re-enacted in Sec. 1621, Rev. Sts.,—"*That the said corps shall at all times be subject to and under the laws and regulations which are or may hereafter be established for the better government of the navy, except when detached for service with the army by order of the President.*"

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[1] In this connection may be noticed a ruling properly made during the late war—that an aid-de-camp to a Governor of a State was not *as such* eligible to be detailed on a court-martial for the trial of U. S. volunteers. G. O. 30, Dept. of the Mo., 1864.

It is of course not competent for a military commander to *order* that courts for the trial of a certain class of volunteer, &c., troops shall be composed in whole or in part of particular volunteer, &c., officers. Thus the order—G. O. 46, Dept. of Va. & No. Ca., 1863—that a majority of the members of courts for the trial of *colored troops* should, (when the same could be detailed without manifest injury to the service,) be officers in command of such troops, was properly revoked by the subsequent G. O. 29, Dept. of Va., 1865.

The latter part of this provision, incorporated with the substance of Article 68 of the code of 1806, forms the present 78th Article.

The principal situations in which marines would be likely to co-operate or be associated with the army on duty, are indicated in the provision of the Act of 1798, embodied in Sec. 1619, Rev.

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[1] Res. of Nov. 10, 1775; Acts of March 27, 1794, July 1, 1797, April 27, 1798, July 11, 1798, and Dec. 15, 1814.

[2] Atty. Gen. Berrien describes the corps, (in 1830,) as—"in many respects anomalous, attached both to the army proper and to the naval armament of the United States, and yet incorporated with neither, but rather *sui generis*" 2 Opins., 357. And see Id., 239–241, 353; 3 Id., 117, where it was regarded as rather belonging to the army; and, *contra*, 1 Id., 381; 2 Id., 78; 5 Id., 705; Com. *v.* Gamble, 11 S. & R., 93; Wilkes *v.* Dinsman, 7 Howard, 125, where it was viewed as an adjunct of the navy—under the legislation prior to 1834.

[3] See 10 Opins. At. Gen., 118, 129, 487; 19 Id., 618, Wilkes *v.* Dinsman, 7 Howard, 125, 126; *In re* Baily, 2 Sawyer, 200; *In re* Doyle, 18 Fed., 369. The corps of the *marines* is not "a distinct military organization," but "a military body, primarily belonging to the navy, and under the control of the head of the naval department, with liability to be ordered to service in connection with the army, and in that case under the command of army officers." U. S. *v.* Dunn, 120 U. S., 253, 255.

Sts., as follows—"*The marine corps shall be liable to do duty in the forts and garrisons of the United States, on the sea-coast, or any other duty on shore, as the President at his discretion may direct.*" Marines were detached for service with the army for considerable periods in the war with Mexico;[1] and similarly on several occasions during the recent war, of which the taking of Fort Fisher was the most marked.[2]

In the early case of Lieut. Col. Wharton of the marine corps,[3] it was held by Atty. Gen. Rush that, under the terms of Art. 68 of 1806, it was *discretionary* with the government whether to detail *any* marine officers on a court-martial for the trial of a marine serving in connection with the army;—that the court might legally be composed of army officers only; and this conclusion was approved by the President. It was deemed expedient, however, to detail two marine officers on the court in that case; and such course, since adopted in practice, is especially fitting in view of the changed relations of the army and marine corps under the subsequent legislation.

In what proportions the two different classes of officers will properly be associated on courts-martial is not indicated by the Article; this matter being evidently left to be regulated by the convening authority in view of the comparative numbers of the officers of the two corps available for the duty, the particular corps—whether army or marines—of the offender or majority of offenders to be tried, &c.[4]

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[1] See the references to the services of this corps in the Mexican war, in 5 Opins. At. Gen., 59, 155; also the recognition of their service by Congress in the J. R. of Aug. 10, 1848, and in the vote of thanks, tendered in the J. R. of Aug. 7, 1848, "to the officers, sailors, and marines of the navy," especially for "their efficient co-operation with the army in the capture of Vera Cruz and the castle of San Juan de Ulloa." See, further, as illustrating the subject, the printed Trial of 1st Lieut. J. S. Devlin, Marine Corps, Washington, 1852.

[2] See official reports of Gen. Terry and Rear Admiral Porter, and votes of thanks to them and their commands in the J. R. of Jan. 24, 1865.

[3] G. O. of Sept. 19, 1817.

[4] Marine, and other, officers were detailed together as follows, in the following Orders:—In G. O., Third Mil. Dept., of Oct. 20, 1813, 1 marine officer with 4 regular and 2 volunteer officers; In G. O., Hdqrs., N. Orleans, of Dec. 25, 1813, 2 marine with 7 other officers; In Dept. O., Second Mil. Dept., Nov. 15, 1817, 1 marine officer with 5 other officers; In Lt. Col. Wharton's case, (*ante*,) 2 marine with 3

Militia.—***Authority for their government, &c.*** The Constitution, Art. I, Sec. 8 § 15, 16, empowers Congress—"To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;" and further —"To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States; reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress." It also, (Art. II, Sec. 2 §1,) makes the President the Commander-in-chief of the militia when in the service of the United States.[1]

By virtue of these grants, Congress, in a series of statutes, particularly in those of May 2, 1792, February 28, 1795, April 18, 1814, May 13, 1846, July 29, 1861, and July 17, 1862, s. 1, has authorized the President, in certain contingencies,[2] to call forth the militia, and has provided for their government; and in a further series, (particularly in those of May 8, 1792, January 2, 1795, May 2, 1803, April 23, 1808, May 12, 1820, March 19, 1836, and July 17, 1862, s. 2,) has provided more especially for their organization, arming, pay, and internal discipline.

Of the former series, the Act of 1792 was repealed and superseded by that of 1795, which was indeed with some slight modifications a repetition of the first. The Acts of 1814 and 1846 were

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regular officers; In Orders, Second Mil. Dept., Nov. 24, 1818, 3 marine with 2 regular officers; In G. O. 6, A. G. O., 1830, 2 marine with 5 regular officers, for the trial of a captain of marines; In O., No. 47, Army of the South, 1836, 2 marine with 5 regular officers; In G. O. 10, Hdqrs. Army, Mexico, 1848, 1 marine officer with 8 regular officers, in a court by which were tried 24 soldiers of the army and 1 enlisted marine.

Hough, (P. 683,) cites a case of an officer of marines, in which, "*at the prisoner's request*, his court-martial," (ordered under an article similar to that of our code,) "was composed of one-half officers of his own corps and the other half of officers of the line."

[1] That the *Militia of the District of Columbia* are no part of the Militia of the Constitution, see *ante*, p. 64, note.

[2] That the President is the sole judge to determine whether one of the exigencies contemplated by the Constitution has arisen, and that his decision on the point is conclusive upon all other persons, was held in Martin *v.* Mott, 12 Wheaton, 19. And see Luther *v.* Borden, 7 Howard, 11; Vanderheyden *v.* Young, 11 Johns., 150; People *v.* Campbell, 40 N. Y., 135; Kneedler *v.* Lane, 45 Pa. St., 238.

resorted to for the special occasions of the late war with Great Britain and the war with Mexico respectively, and presently expired by their own limitation.[1] To the date of the Revised Statutes the Act of 1795 remained the principal law on the subject of the mobilization and government of the militia, though in some of its details superseded or materially amended by the Acts above specified of 1861 and 1862.[2] These Acts were indeed adaptations of the legislation of 1795 to the circumstances of the recent war. Such of their provisions as were of a general character, together with those remaining from the Act of 1795 and other early legislation, comprise, (in combination with the operative enactments of the second series above indicated,) the existing law relating to the militia, and are all incorporated in a separate Title—No. XVI—of the Revised Statutes.

The first section of this Title defines the militia as including, generally,[3] "every able-bodied male citizen of the respective States, resident therein, who is of the age of eighteen years, and under the age of forty-five years;" and Atty. Gen. Legaré has well described this class as "the body of the people, armed and disciplined in self defense."[4] When and how the militia are brought within the *jurisdiction* of courts-martial, and what is the extent of that jurisdiction, will be considered in the next Chapter.

Composition of militia courts.[5] As to the composition of such courts,—Sec. 1658, Rev. Sts., (a re-enactment, in the same words, of s. 6 of the Act of 1795,[6]) provides: "Courts-martial for the trial of militia shall be composed of militia officers only."

The "courts-martial" here indicated are courts-martial not of States but of the United States, convened not under State law but under the Articles of war, and the militia referred to are the militia when called into the active service of the United States under the Constitution and the laws above mentioned. The "militia officers" are the officers elected or appointed for such militia under the laws of the States from which they are called, in conformity with the Constitution, Art. I, Sec. 8, § 16.

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[1] See Mills *v.* Martin, 19 Johns, 21, 23.

[2] By the Act of 1862, the President was, for the first time, authorized to resort to conscription for compelling the service of the militia. See McCall's Case, 5 Philad., 259.

[3] With certain exemptions specified in Sec. 1629.

[4] 2 Opins. At. Gen., 691. The so-called "*National Guard*" is simply a part of the militia. Neither the Constitution nor Laws of the United States distinguish it in any manner from the mass of the militia.

[5] As to the courts-martial of the militia of the District of Columbia, see *ante*, p. 64, note.

[6] This provision was also contained in the code of articles of 1806, (in Art. 97,) but was omitted from that of 1874.

In composing, however, courts-martial for the trial of militia, the members are to be selected from the entire body of militia officers in the service of the United States, without any reference to the different States from which they may have been called. Militia once called into the service, from whatever State, may be placed by the President under the command of *any* officer,[1] and may be required to serve in any part of the United States;[2] and it was specifically held in Mills *v.* Martin[3] that a court for the trial of a militiaman need not be composed of officers of the militia of the State of the accused, but might legally be made up of officers of the militia of *any* State or States. In the article of war of 1776, in which the statute under consideration first appeared in our law, it was provided that militia courts should "be composed entirely of militia officers of the same provincial corps with the offender." This restriction was omitted in the corresponding article of 1806, the original provision having been meanwhile superseded by the present form as initiated in the Act of 1795.[4]

II. NUMBER OF MEMBERS.

The Law on the Subject. This is contained in Art. 75, as follows:—"*General courts-martial may consist of any number of members from five to thirteen; but they shall not consist of less than thirteen when that number can be convened without manifest injury to the service.*"

Five Members a Quorum. It is clear from the first part of this provision that, while a court of less than five or more than thirteen[1] members will not be a legal body,[2] a court of five will always be a full and complete tribunal for the purpose of trial and judgment, and that the addition of further members will not augment or in any manner affect its jurisdiction or authority. A less number indeed than five may meet and adjourn, and where there are but five members present at the outset and one is objected to, (under Art. 88,) the other four may deliberate and determine upon the challenge.[3] But five members at least must be sworn and constitute the court for the trial, and five must continue present and acting throughout the entire proceedings till the final record is completed and authenticated.

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[1] Cooley, note to 2 Story, Com., 121.

[2] Highsmith *v.* Ussery, 25 Texas, 108.

[3] 19 Johns., 7.

[4] The present enactment is, as has already been noticed, properly an article of war, and might well have been embraced in the present, as it was in the preceding, code.

If the court begins with more than five members, the loss or absence of one or more does not affect its capacity provided at least five remain, and this rule applies through the entire life of the body.[4] Thus five are sufficient to be re-assembled and to revise the sentence, though when it was originally adjudged, the court may have consisted of ten or thirteen members; and the sentence, as revised and finally adopted by the five, will be the sentence of the court.[1]

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[1] The first Mutiny Act prescribed that no court authorized thereby should "consist of fewer than thirteene." Clode, (M. L., 120,) observes:—"It may reasonably be presumed that the controlling analogy which suggested this tribunal, (composed of a president and twelve officers,) was the civil administration of justice by a presiding judge and twelve jurymen." In the present British law, "a general court-martial shall consist, in the United Kingdom, India, Malta, and Gibraltar, of not less than nine, and elsewhere of not less than five, officers." Army Act, § 48, (3.)

[2] Thirteen members were usually detailed on our earlier important general courts-martial—those, for instance, for the trials of Gens. Hull, Wilkinson and Gaines, and Col. Cushing, in 1811–1818. So, for the trials of Capt. Drane in 1846, Lt. Col. Fremont in 1847, and Gen. Twiggs in 1858. Of later years the maximum has more commonly been nine—the number in the cases of Gens. Porter and Hammond, in the recent war. In the cases of Gens. Swaim and Hazen, however, the number detailed was thirteen, and that number is now, (1894–5,) more resorted to than heretofore. In the British service, before courts of less than thirteen were authorized for the trial of officers, the number of members often exceeded that number. For example, the number detailed for the trial of Lord George Sackville, in 1760, was sixteen; for the trials of Lt. Gen. Murray and Col. Debbieg, in 1783 and 1784, eighteen; for the trial of Lt. Gen. Mordaunt, in 1757, twenty-one; and for the trials of Capt. Burrish, Lieut. Page, and others, tried by a naval court in 1745, twenty-five.

[3] DIGEST, 88.

[4] A form, now unknown, prevailed to some extent in our army, apparently till about 1841, of detailing 13 or 11 members, with directions to proceed if not reduced below 9 or 7. See G. O. 44 of 1832; 3 of 1837; 25 of 1839; 65 of 1841.

On the other hand, if a court, beginning with five or more, loses, by the operation of challenge, or by death, sickness, or other casualty, a member or members, so that it is reduced to four or less, its action must be at once suspended, since it has ceased, for the time at least, to be a court, and the objection to its proceeding is one which cannot be waived.[2]

The number—within the limitations of the Article—to be detailed upon a general court for the trial of any case or cases, will be determined by the convening commander in his discretion, and with a view especially to such circumstances as the rank of the accused, the importance of the case, the character of the offence, the supply of available officers, and the exigencies of the service.[3]

Authority to add Members. A General court, though reduced below five, is not necessarily to be dissolved, nor can it assume to dissolve itself or declare itself dissolved. Such dissolving is a function of the convening commander, who is also empowered, in his discretion, to continue the court by adding a member, or the requisite number of members to bring it up to five, and when thus renewed, its power as a court is restored, and it may legally proceed with the trial.[4] The adding, however, of new members to courts-martial, *after a trial has been entered upon*, has been of rare occurrence in our practice. Such action is not indeed illegal;[5] the added member, provided the evidence taken, or material proceedings had, prior to his appearance, be first read to him from the record, and he be duly sworn, (after the accused has been afforded an opportunity to challenge him,) may legally act upon the court during the remainder of the trial and take part in the judgment; and the sentence, if any, imposed by the court will be entirely legal and operative. But this action must be in general of doubtful policy, and is not to be resorted to unless the demands of justice and interests of the service clearly require it. Where, for example, by the death, disability, enforced absence, &c., of a member or members, a court is reduced below five, in the midst of an important trial, so that, if not renewed, its previous proceedings, however extended, will go for nothing, and the trial will have to be recommenced by a new court, to the delay of justice, inconvenience of the service, detriment of discipline, and perhaps greatly increased public expense, —in such a case the authorized commander will be fully justified in continuing the court by the detail of the requisite number of members.

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[1] DIGEST, 678. And see 7 Opins. At. Gen., 338. The direction often given in convening orders to the effect that "should any of the members be prevented from attending, the court will proceed provided the number present be not less than the legal maximum"—is wholly unnecessary and surplusage.

[2] DIGEST, 88.

[3] Coppée, 55.

[4] DIGEST, 88.

[5] Though not favored, it has been regarded as legal in our service ever since it was sanctioned by the Secretary of War on Gen. Hull's trial in 1814. The Secretary there held that new members might be added pending a trial, "the proceedings as recorded being read to them." See published Trial, appendix, p. 29. From this ruling dates also the authority for the returning to the court of absent members, a subject to be considered in Chapter XII.

Effect of Second Clause of Article.—*"Manifest injury."* The Article, as has been seen, declares that a general court "*shall not consist of less than thirteen when that number can be convened without manifest injury to the service.*" In a case of a deserter sentenced to be shot by a court of five members, it was held, at an early period, (1810,) by Atty. Gen. Wirt,[1] that the court "was not a legal" one "if thirteen could have been convened without manifest injury to the service." He adds:— "It is difficult to conceive an emergency so pressing as to disable the general officer who orders the court from convening thirteen commissioned officers on a trial of life and death, without manifest injury to the service. And if a smaller number act without such manifest emergency, I repeat that they are not a lawful court, and an execution under their sentence would be murder." He concludes by suggesting to the Secretary of War "as a matter of legal propriety, that in every case of life and death at least, the President ought to be satisfied of the manifest injury which the service would have sustained in convening a court of thirteen before he gives his sanction to a sentence of death by a smaller number."

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[1] 1 Opins., 299, 300.

This case was one which occurred in time of peace, when death sentences are required to be confirmed by the President, and, being of an extreme class, it was proper that the fullest weight should be given to any legal doubt as to the validity of the proceedings. But the theory that the question of "manifest injury" is reviewable by the President, or any authority superior to the officer who ordered the court, has ceased to be admissible since the specific adjudication on the subject, in 1827, by the Supreme Court in the case of Martin *v.* Mott.[1] In this case, Story, J., in construing the provision of the Article under consideration, held that the same was "merely directory to the officer appointing the court, and that his decision as to the number which can be convened without manifest injury to the service, being in a matter submitted to his sound discretion, must be conclusive." This ruling settled the law on this point,[2] and the question as to the legality of a court of less than thirteen members is not now raised in practice.

In the form of Order for convening a general court, now commonly employed, a clause is generally added, after the recital of the officers detailed, when less than thirteen, to the effect that 'a greater number of officers than those named cannot be assembled without manifest injury to the service.' Such addition, however, though usual, is not necessary, and its omission will affect in no manner the validity of the order. The mere fact that less than thirteen *are* detailed will constitute a sufficient indication of the determination by the convening officer, in his discretion, that a greater number can not in fact be assembled without the prejudice to the service contemplated by the Article.[3]

Supernumerary Members. It remains to notice a practice, which at one time prevailed in our service, of detailing, with a court of thirteen, (and sometimes with a court of a lesser number,) one or more additional officers as "supernumeraries," whose purpose was to supply the places of such original members as might be excluded on challenge, or whose seats might be vacated by absence,—thus keeping the court always up to the maximum. These officers took their seats with the court and were sworn with it, were subject to challenge, were present during the trial and permitted to take part in discussions on interlocutory questions but not to vote thereon, and retired—if not previously becoming full members—when the court was finally cleared to deliberate upon its findings and sentence.[1] This practice, however, had no statutory sanction, and, in substantially adding members with limited indeed but material powers to the maximum of thirteen, was in fact in contravention of the Article of war. It has been disused in our service for some fifty years,[2] though in the British it still subsists in a different form.[3]

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[1] 12 Wheaton, 34.

[2] See 2 Opins. Atty Gen., 535; 6 Id., 511; Wooley *v.* U. S., 20 Law Rep., 631, and Am. S. P., M. A., vol. IV., 850; G. O. 4, Mil. Div. Atlantic, 1874; also Clode, (M. L.,) 123. And see the recent case of Mullan *v.* U. S., 140 U. S., 245.

[3] See O'Brien, 228. The early case of Mills *v.* Martin, 19 Johns., 26, (1821,) is, in effect, *contra*. But the provision under consideration had not then received the interpretation subsequently given it in Martin *v.* Mott. Par. 1002, A. R., now declares—"A decision of the appointing authority as to the number that can be assembled without manifest injury to the service is conclusive."

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[1] See De Hart, 88; Macomb, 15; O'Brien, 226; Benét, 28, 87; Coppée, 46, 54. Supernumeraries are constantly detailed with general courts in the early Orders of the War Department, &c., especially from 1809 to 1836. In each of the cases of Gens. Hull, Wilkinson and Gaines, three supernumerary members were named in the original detail. Supernumeraries were also detailed in the navy, and for courts of less than thirteen members. See 1 Opins. At. Gen., 698.

[2] The paragraph, (§ 237,) of the Army Regulations of 1841, directing the detailing of "one or more supernumeraries" with courts of thirteen members, does not appear to have been repeated in any subsequent issue. A comparatively recent, though isolated case, is published in G. O. 9, Dept. of the Mo., 1862, of a general court attended by a supernumerary, who, upon a vacancy occurring on the trial of an officer, took a seat as a member.

[3] The British law authorizes the convening authority to detail, with the regular members, "such *waiting officers* as he thinks expedient," with a view "to provide for casualties or for the case of challenges being allowed." Rules of Procedure, § 17 (D,) 25 (G,) Simmons, §§ 427, 526.

CHAPTER VIII.

THE JURISDICTION OF GENERAL COURTS-MARTIAL.

THE subject of the jurisdiction of general courts-martial will be considered under the following heads:—

I. The Place or field over which such jurisdiction extends or within which it may be exercised;
II. The period of Time to which its exercise is limited;
III. The Persons who are subject to it;
IV. The Offences which it embraces.

I. THE PLACE OR FIELD OF JURISDICTION.

It includes the entire United States. The jurisdiction of general courts-martial is coëxtensive with the territory of the United States. That is to say, a general court assembled at any locality within that territory may legally take cognizance of an offence committed at any *other* such locality whatever; such a court, unlike a civil tribunal, not being restricted in the exercise of its authority to the limits of a particular State or other district or region. While it will in general be more for the interest and convenience of the service to bring an accused officer or soldier to trial at or near the place of his offence, he may, with equal *legality*, be tried by a court convened, (by competent authority,) in any other part of the United States.[1] This is a general principle, nor is its application limited to cases in which the court is convened by a commander whose command is conterminous with the federal domain—as the President as Commander-in-chief, or the general commanding the army. A court ordered by a department commander within his department, for the trial of an officer or soldier of his command, may make take cognizance of the case though the offence or offences may have been committed in any other department or departments. It may be added that the question, whether an offence was or not committed at a place over which exclusive jurisdiction has been reserved or ceded to the United States, can affect in no respect the jurisdiction of the *military* court before which such offence is brought for trial.

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[1] See DIGEST, 322.

Extends to Region of Military Occupation in War. Further, such jurisdiction extends to the places or territory held or occupied by our armies when invading the domain of a foreign nation with which we are at war. A court-martial, whether assembled in the foreign territory or in the United States, will have jurisdiction of military offences committed within such places equally as if committed on our own soil.[1]

Effect of Principle of Exterritoriality. Such jurisdiction extends also to offences committed by our officers or soldiers within the lines or in the neighborhood of our armies, when in the transit, by the permission of its government, through the domain of a foreign nation with which we are at peace. This on the principle of international law known as "exterritoriality," under which when the armies of one nation are privileged to enter or pass through the territory of another friendly nation, the laws of the former are deemed to continue to apply to its forces equally as if the same were within their own country.[2] Such, for example, would be the legal status of our troops when permitted by the government of Mexico to cross the frontier in carrying on hostilities against Indians.[1]

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[1] "Wherever our army or navy may go beyond our territorial limits, neither can go beyond the authority of the President or the legislation of Congress." Chase, C. J., in Ex parte Milligan, 4 Wallace, 141. And see 5 Opins. At. Gen., 58; Coleman *v.* Tennessee, 97 U. S., 515, 516. In the latter case the law was applied to offences committed by soldiers of our army when in occupation of insurrectionary districts during the late war, and it was held that, (as in the case of an army lawfully marching through the territory of a foreign country—see *post*,) our army was then exempt from amenability to the local courts and subject only to the jurisdiction of its own military tribunals.

[2] "This privilege is extended to armies in their permitted transit through foreign territory," and includes the right "of exercising military discipline on the officers and soldiers. * * * When the transit of troops is allowed, it is apt to be specially guarded by treaties." Woolsey, Int. Law, 64; Vattel, 3., 7 § 130. And see The Exchange, 7 Cranch, 139; Coleman *v.* Tennessee, 97 U. S., 515.

Cases of Offences committed in Friendly Foreign Territory, entered without Authority. A status less clearly defined in law is that of our military forces when induced, in pursuit of Indians or marauders, or for other purposes, to enter the territory of a foreign power with which we are at peace, *without its authority.* While such an entry of an armed body would be *per se* unlawful,[2] it is nevertheless the opinion of the author that military offences committed by any of such forces on the foreign soil would properly be cognizable by courts-martial convened within the United States, provided the offender at the time of the offence was a member of an organized detachment or other force under military command and discipline. For while a refusal to cross the boundary under the circumstances might not constitute a disobedience of a "lawful command" in violation of the 21st Article of war, it does not follow that an act of insubordination, neglect, or disorder, or an act of desertion, committed after the passing of the frontier in obedience to orders, would not be cognizable and punishable as a military offence equally as if committed within our own territory. Indeed, that it *would* be so cognizable can scarcely reasonably be questioned.[1]

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[1] There has in fact existed for some years a formal "provisional" agreement between the governments of the United States and Mexico, stipulating for the "reciprocal crossing in the unpopulated or desert parts of the international boundary line, by the regular federal troops of the respective governments, in pursuit of savage hostile Indians." This agreement, originally made in July, 1882, (see G. O. 91, 118, of 1882,) to continue in effect for one year, has been since repeatedly renewed. The last form of the agreement is dated Nov. 25, 1892, and is to continue in force not beyond one year. See it published in G. O. 85 of Dec. 22, 1892. Of this agreement the only portion that need be cited in this connection is the following: "ART. VII. The abuses which may be committed by the forces which cross into the territory of the other nation shall be punished by the government to which the forces belong, according to the gravity of the offence and in conformity with its laws, as if the abuses had been committed in its own territory, the said government being further under obligation to withdraw the guilty parties from the frontier."

[2] It would, in the first instance, be unlawful for any subordinate commander to direct such an invasion or command the invading party, except under orders emanating from the highest authority. In Com. *v.* Blodgett, 12 Met., 84, 90, the court say:—"Nothing but the sovereign power of the State, by a previous order directing such invasion, or by a subsequent ratification when done in its name, will warrant such invasion, and excuse the subordinates engaged in it. * * * Such act is a high prerogative of sovereignty and the necessity of it must be judged of, and the warrant for it must be given, by the express command or direction of the sovereign authority." Note, in this connection, G. O. 97 and 100, Dept. of the East, 1864. In the former Order, military commanders near the Canadian boundary were instructed by General Dix to cross the same where necessary in pursuit of marauders, and pursue, capture and bring them within the United States for trial and punishment. In the latter Order, it was announced that this instruction had been *disapproved* by the President and was accordingly revoked.

Offences committed in a foreign country when the offender is not present in a military capacity. Thus an officer or soldier of our army committing, in a foreign country, an act which, if committed at home, would constitute an offence against our military code, would in general be amenable to trial therefor, by court-martial, on his return, provided that when he committed it he was within the foreign territory *in a military capacity.* But if *not* present there in a military capacity—as where he had passed the frontier for private business or amusement, or on a social visit, or for other personal reason, or was there as a deserter from our army—his amenability to trial by a court-martial in his own army for an offence committed would depend upon the nature of the offence itself. A crime or disorder committed against an inhabitant of the country could ordinarily scarcely be cognizable under the 62d Article as prejudicial to military discipline, or otherwise than according to the local law. But for an act which at home would constitute conduct unbecoming an officer and a gentleman, an officer offending would in general remain as liable to trial under Art. 61 as if the offence were committed within the United States. Thus it has been held that an officer of our army was liable under this Article to trial by court-martial in Texas for the offence of exhibiting himself in a drunken condition at a public entertainment in Mexico.[1] The status of amenability of the officer or soldier under the circumstances would thus be analogous to that of an officer or soldier absent on leave or furlough within his own country,[2] or while held as a prisoner of war by the enemy.[3]

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[1] In the case of Pvt. Joseph Lee, convicted by a general court-martial in Texas of manslaughter, consisting in the homicide of a sergeant of the detachment while on a scout within Mexico,—in which the proceedings and sentence were approved by Gen. Ord in G. C. M. O. 17, Dept. of Texas, 1877,—it was held by the Secretary of War, June 23, 1877, that the court had jurisdiction of the case.

The ruling *contra*, by a department commander in a case published in G. C. M. O. 35, Dept. of the Missouri, 1872, is not regarded as sound.

The point may here be noticed, though not as a matter necessarily affecting *jurisdiction*, that our military authorities can have no authority to enter a foreign country for the *arrest* there of a military offender who has escaped from the United States. Thus, in G. O. 119, War Dept., 1863, an officer of volunteers is dismissed by the President "for violation of the sovereignty of a friendly foreign State, in arresting a deserter from the U. S. forces and bringing him away from within the boundaries of Canada."

The question of jurisdiction as affected by the 64th Article. This Article provides as follows: "*The officers and soldiers of any troops, whether militia or others, mustered and in pay of the United States, shall, at all times and in all places, be governed by the articles of war, and shall be subject to be tried by courts-martial.*"

This enactment has recently been construed as conferring upon courts-martial by the term—"*in all places,*" a jurisdiction over offences commited by officers or soldiers of the army in foreign countries, and thus to constitute authority for the trial, by a court-martial convened in our own territory, of a military offence committed abroad.[4] With due deference to its source, this construction can but be regarded by the author as a forced one and not warranted either by the context or history of the Article. It is considered that this Article is a declaratory provision intending no more than simply to affirm the general rule of amenability to military law of any forces or detachments, such as militia or marines, who may be serving with the army in time of war, rebellion, &c., assimilating them to the latter in respect to discipline and jurisdiction. To the army itself, as such, the Article, it is believed, is not intended to apply, but only to the contingents which, under the Constitution and laws, may be employed with it in the U. S. service on particular occasions. This is deemed to be quite clear from the language of the *original* provision, which occurs first in Art. 1, Sec. xvii., of the Articles of 1776 and is repeated in Art. 97 of the code of 1806. Here, after the words—"in all places," is added—"*when joined or acting in conjunction with the regular forces of the United States.*" Nor, in the view of the author, does the fact that this part of the Article is now omitted modify or affect its import, since these additional words were surplusage merely and doubtless omitted for that reason. It would only be when militia, marines, &c., were serving in connection with the army that they would properly be amenable to the jurisdiction of army courts, and, by the omission, the Article has been merely simplified without any change of meaning.

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[1] See DIGEST, 331.

[2] See G. C. M. O. 14, Dept. of Texas, 1888; also remarks upon this Article in Chapter XXV, *post.*

It may be observed, however, that, whether or not the offending officer or soldier were within the foreign territory with or without authority from his proper military superiors, would be immaterial: his status of amenability to our jurisdiction for offences committed in that territory would not be affected by the circumstance of his having been there with or without a leave of absence or pass, or other permission.

[3] See *post*—"Jurisdiction during Absence on leave or as a Prisoner of war."

[4] This ruling was one made by the Acting Judge Advocate General, in January, 1891, in a case of an officer who, having committed in Mexico what would be a military offence under our Art. 61, was held triable therefore by a court martial subsequently convened in the Department of Texas, not only on general grounds but also *by the authority of this Article.* See DIGEST, 331.

The sound conclusion is thus considered to be that the Sixty-fourth Article has, in fact, no larger or other significance or scope than as an enunciation of a general principle as aforesaid, and accordingly affects in no manner whatever the question of the amenability of officers or soldiers of the army for offences committed in foreign countries. This Article indeed, as being declaratory of the law as enacted in other statutes,[1] might well be dropped as superfluous upon a revision of the existing code.

II. THE TIME WITHIN WHICH JURISDICTION IS TO BE EXERCISED.

As affected by the Limitation of Art. 103. If the jurisdiction of a general court-martial can properly be regarded as controlled in its exercise by any general rule of limitation as to

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[1] As the Act of Feb. 28, 1795, c. 36, s. 4; the Act of July 29, 1861, c. 25, s. 3; Secs. 1621, 1644, Rev. Sts.

time, such general rule is that prescribed in the 103d Article of war. This Article, (as amended by the Act of April 11, 1890,) prescribes that for all offences, except "*desertion in time of peace and not in the face of the enemy*," an officer or soldier shall not (unless meanwhile withdrawn by absence, &c., from the jurisdiction) be liable to trial by general court-martial, where the offence "*appears to have been committed more than two years before the issuing of the order for such trial.*" In the excepted case of desertion, it is provided that the party (unless meanwhile absent from the United States) shall not be so triable where, at the time of his arraignment, *more than two years* have elapsed since the *end of the term* for which he enlisted.

But the question here arises whether this Article is to be viewed as a prohibitory restriction upon *jurisdiction*, or merely as providing a *defence* to be taken advantage of by special plea.

View of Attorney General Wirt. It was held at an early date, (1820,) by Mr. Wirt,[1] in construing this Article, that the limitation thereby prescribed was *absolute* in all cases and could not be *waived*. The reason assigned for this opinion was in effect that the Article was an enactment based upon considerations of *public policy*, being intended not solely for the benefit of the accused, but to secure that prompt and certain prosecution of military offences which is essential to maintain the discipline of the service; and that therefore it was to be regarded as prohibitory not only upon the United States but upon the accused also. The view of Mr. Wirt, that the limitation was not waivable, was affirmed by later Attorneys General,[2] and for a considerable period was recognized in the War Department as established law.[3] And it was held by the Judge Advocate General,[4] and subsequently by the Attorney General,[5] that an accused could not, by a *plea of guilty* at the trial, any more than by previously requesting,[1] or by consenting without objection, to be tried, waive the limitation and withdraw the case from the application of the Article, where it appeared from the charge that the offence had been committed more than two years before the ordering of the court.

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[1] 1 Opins., 383. Compare this view with the converse view expressed by him, in 1 Opins., 233, as to the waiver of the benefit of the provision of Art. 102, a point remarked upon in Chapter XVI.—"Waiver of the right to plead former trial."

[2] 6 Opins. At. Gen., 239; 13 Id., 463; 14 Id., 267–8; 16 Id., 173.

[3] See the opinion, as adopted by the Secretary of War, of Judge Advocate General Holt, in the case of Brig. Gen. Dyer, Chief of Ordnance. Proceedings of Court of Inquiry, Part II., pp. 612–614.

[4] See DIGEST, 12

[5] 16 Opins., 17

Ruling of the U. S. Circuit Court. If this view as to the effect of the Article is the correct one, the subject of the limitation is properly to be considered in the present Chapter. But though this view was apparently that taken by the U. S. District Court for the Southern Dist. of New York, in 1880, in Davison's case,[2] the judgment in that case was, in 1884, reversed on appeal in the U. S. Circuit Court, Second Circuit,[3] where it was in substance held that the limitation of Art. 103 was not a jurisdictional objection but a "matter of defence;" the court here adopting the ruling which had been made at San Francisco in the previous year, in Bogart's[4] and White's Cases,[5] by the Circuit Court for the Ninth Circuit. In these cases, (and subsequently in Zimmerman's Case,[6] in the same Circuit,) the courts, in effect though not in terms, overrule Mr. Wirt's opinion, and treat the military statute of limitations as the United States' and State statutes of limitations relating to crimes are ordinarily treated, *viz.* not as a restriction upon the powers of the court, but as a provision solely or mainly for the benefit of the accused, to be taken advantage of by him at his option, by way of defence in the form of special plea, or on the general issue.

These rulings are followed in the War Department, and have now apparently settled the law upon the question involved. In view of this conclusion, the subject of the application and operation of the provisions of Art. 103 has been incorporated in Chapter XVI, in treating of PLEAS.

Term of Jurisdiction in general. The term of time during which an officer or soldier continues within the jurisdiction of a court-martial is the term between the time of his entering the military service by acceptance of appointment or commission, or by enlistment or muster in, and the time of his leaving it by resignation, dismissal, discharge, or death. This subject will be more fully treated in this chapter, under the later head of—"Beginning and End of the Personal Amenability."

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[1] See Gen. Dyer's Case, *ante.*

[2] *In re* Davison, 4 Fed., 507.

[3] 21 Fed., 618.

[4] *In re* Bogart, 2 Sawyer, 397.

[5] *In re* White, 9 Sawyer, 49, 17 Fed., 723.

[6] *In re* Zimmerman, 30 Fed., 176.

As affected by the Continuance of War. While the termination of a state of war does not, as such, affect the jurisdiction of a court-martial, as it does that of a military commission—a tribunal whose action is determined by the existence and continuance of war—there are yet cases in which, by the express terms of a statute, or by implication from its terms, the jurisdiction of a court-martial over certain specific offences is restricted to the period of war. Thus the 58th Article of the code expressly makes the offences therein enumerated punishable by sentence of general court-martial only in time of war, rebellion, &c., and if in any case the war which prevailed at the commission of the offence has ended[1] before the same is actually brought to trial, the court will not be legally competent to take cognizance thereof under this Article. Similarly, it has been held that Sec. 1343, Rev. Sts., relating to the offence of the spy, inferentially limits the trial by court-martial of a spy to the period of the duration of the war, &c., so that if not brought to trial before the war is terminated, he cannot be tried at all.[2]

The term "*war*," as employed here and elsewhere in this treatise, is to be understood as including not only foreign or international war, but also civil war, as well as a state of active hostilities with an Indian tribe.

III. THE PERSONS SUBJECT TO THE JURISDICTION.

Classification. General courts-martial, created and empowered as they are by express statute, can exercise jurisdiction over such persons and offences only as are constitutionally brought by statute within their cognizance. By the articles of war and other statutes certain classes of persons are rendered, or declared to be, amenable to the jurisdiction of courts-martial, as follows:—I. The Army of the United States; II. The militia when called into the service of the United States; III. Officers and soldiers of Marines when detached for service with the Army; IV. Certain civilians subjected to military discipline in time of war; V. Certain other civilians.

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[1] As to what constitutes a legal termination of a state of war, see Chapter XXV.—FIFTY-EIGHTH ARTICLE.

[2] *In re* Martin, 45 Barb., 142; Wells on Jurisdiction, 577.

I. The Army of the United States.[1]

In this designation are embraced the following:—1. The Standing or "Regular" army; 2. Volunteers; 3. Drafted men.

1. The Regular Army. The constituents of this army are the officers, soldiers and others specified in Sec. 1094, Rev. Sts., and its amendments, *viz.:* certain general officers and their aids; certain officers and enlisted men of the staff departments; certain officers and enlisted men of the enumerated regiments of artillery, cavalry and infantry; certain enlisted men of the hospital corps and "general service," or unattached to regiments, &c.; the "army service men of the quartermaster department;" a force of enlisted Indian scouts, the corps of professors and cadets[2] of the Military Academy, and the officers and enlisted men of the retired list.[3] The total enlisted force, exclusive of the "general service" and the hospital corps, is fixed by statute at 25,000 men. The aggregate of the entire army, officers and enlisted men, (including the officers and men of the retired list, amounting to 1,562,) is given in the Army Register for 1895 as 29,838. These members of the regular army of whatever grade are all military persons: there exists no longer in our service what was once styled the "civil branch" of the army. Our surgeons, paymasters, chaplains, storekeepers, &c., are all now commissioned officers in the same manner as are the officers of the line, and, whether or not having commands, are, equally with the latter, military officers. The professors of the Academy, though without rank, are, as indicated in the foregoing Chapter, commissioned officers; and even the cadets, whose status was for a long period not clearly defined,[1] are now held to be "inferior officers, appointed though not commissioned."[2]

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[1] The President, though commander-in-chief, is not a part of the army or a military person. In Parker *v.* Kaughman, 34 Ga., 136, it was held that the President of the "Confederate States," being commander-in-chief, was "in the army;" but this was probably a misconception.

[2] That Cadets have always been a part of the Army, see Morton *v.* U. S., 112 U. S., 4.

[3] That retired officers are a part of the army and so triable by court-martial—a fact indeed never admitting of question—is adjudged in Tyler *v.* U. S., 16 Ct. Cl., 223; Id., 105 U. S., 244; Runkle *v.* U. S., 19 Ct. Cl., 396. And see Hill *v.* Territory, 2 Wash. Ter., 147. By the Act of Feb. 14, 1885, enlisted men of the army and marine corps were made eligible to retirement after thirty years' service.

In time of *peace*, the "regular" army ordinarily constitutes the entire Army of the United States.

2. Volunteers. In time of war the regular contingent has commonly been supplemented by a force of volunteer troops: in the late war indeed the volunteers composed by far the greatest portion of our army. Though in some particulars of its organization assimilated to the militia, this force is in fact as well as in law quite distinct therefrom. Originated under the constitutional power "to raise armies," not under the power "to provide for calling forth the militia," it is also distinguished from the militia in the persons composing it, in the period of their service, and in the duties upon which they may be employed. The *militia* is composed of citizens between 18 and 45 years of age, (Rev. Sts., Sec. 1625,) their term of service cannot exceed nine months, (Id., Sec. 1648,) and they cannot be used for the invasion of a foreign country or for military service abroad.[3] The employment of *volunteers* is not limited by any of these restrictions. That this force, though differing from the regulars in that it is resorted to for a temporary purpose,[4] is, equally with the latter, a part of the Army of the United States, has, (as indicated in the last Chapter,) been expressly held and adjudged.[5]

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[1] As to the status of the Cadets as viewed by the Attys. General, see 1 Opins., 276, 469; 2 Id., 251; 7 Id., 323; 16 Id., 611. That they are liable to trial by garrison, (as well as by general,) courts-martial was held by Wirt, (1 Opins., 469,) and affirmed by Cushing, (7 Id., 323).

[2] Babbitt *v.* U. S., 16 Ct. Cl., 202.

[3] McCall's Case, 5 Philad., 259.

[4] 7 Opins. At. Gen., 621.

[5] Burroughs *v.* Peyton, 16 Grat., 483; Kerr *v.* Jones, 19 Ind., 351; Wantlan *v.* White, Id., 470; DIGEST, 60, 424, 478. And see 3 Opins. At. Gen., 696; 6 Id., 484; 7 Id., 621.

3. Drafted Men. Through the necessities of the government there came to be added, during the recent war, to the Army of the United States a further body of *drafted men*, who entered the military service not as volunteers but compulsorily, under the provisions of the Act of March 3, 1863, c. 75, and the succeeding statutes in amendment, &c., of the same. This is the first and only instance in our history in which the regular army has been recruited by conscription.[1] Owing to the defects in the operation of the existing militia systems of the States,[2] and to the fact that the *materiel* of the militia was limited to citizens,[3] the measure of adding to the military strength of the country by calling out the militia had, notwithstanding the authority to enrol this force conferred upon the President by the Act of July 17, 1862, proved quite inadequate to the emergencies of the period. The Act of 1863 was therefore passed, by which all able-bodied citizens of the United States and all aliens who had declared their intention to become citizens, between the ages of twenty and forty-five years, were constituted "national forces," and required to be enrolled subject to draft by the United States authorities. This Act did not repeal that of 1862, but being "more matured in its details than any system that could have been organized for the militia,"[4] as well as more efficient and comprehensive in its operation, was resorted to almost exclusively in lieu of the former statute.[5] The Act of 1863 and the system thereby inaugurated have received an especially careful examination in McCall's Case[6] and the leading case of Kneedler *v.* Lane,[7] in which the Act was held to be a constitutional exercise of the power of Congress "to raise armies," and the troops raised by draft under the machinery which it provided were held to constitute a part of the Army of the United States.[1] As such they were of course subject to trial by court-martial.[2]

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[1] Drafts of *State* troops were resorted to during the Revolutionary war. See 2 Jour. Cong., 458-9; 3 Do., 38. An Act of June 30, 1834, refers to "draughted militia" as in service against Indians on the frontier.

[2] McCall's Case, 5 Philad., 267. It was anticipated by Hamilton in the Federalist (p. 117) that the militia could not be depended upon as an adequate force for war. And see Com. *v.* Barker, 5 Bin., 429; U. S. *v.* Blakeney, 3 Grat., 417.

[3] 6 Opins. At. Gen., 484.

[4] McCall's Case, 5 Philad, 268.

[5] Subsequently to its passage there was but one call for militia, (limited to four States,)—that by proclamation of June 15, 1863.

[6] 5 Philad., 259.

[7] 45 Pa. St., 238. So Jenkins, J., of the Supreme Court of Georgia, (November, 1862,) decided the Confederate conscript Act to be constitutional, as being within the power to raise armies as distinguished from the power to call out militia. VI. Rebellion Record, 15.

General Provision of Sec. 1342, Rev. Sts. Thus defined, the Army of the United States, whether composed solely—as in time of peace—of the regular army, or—as in time of war—of this and one or both of the other contingents named, is, as a whole, made subject to the jurisdiction of courts-martial by this Section, which, in prefacing the military code, declares: "The armies of the United States shall be governed by the following rules and articles." Certain particular classes—as the retired officers, by Sec. 1256, Rev. Sts.—are made specifically so subject, but such provisions are unnecessary in view of this general enactment.

The opinion once expressed by Atty. Gen. Wirt,[3] to the effect that no military persons or forces could properly be treated as subject to the articles of war, unless so subjected in specific terms by the separate statute making them a part of the army, if ever sound, certainly cannot now be maintained in view of the comprehensive terms of Sec. 1342. Now, whenever any addition is made to the army, the person or force added will, without any such express provision in the statute, at once come within the general application of this Section, and be thenceforth subject to the military jurisdiction.

Beginning and End of the Personal Amenability—General Rule. Here, as especially applicable to officers and soldiers of the army proper, may suitably be considered the subject of the duration or continuance of the amenability of the *person* to the military jurisdiction.

It is the *general rule* that the person is amenable to the military jurisdiction only during the period of his service as an officer or soldier. Thus, in the case of an *officer*, the jurisdiction commences with the acceptance of his appointment or commission,[1] or, where originally appointed by State authority, with his muster, (or re-appointment,) into the service of the United States, and ends with his death, the acceptance of his resignation, his dismissal,[2] &c., or—if a volunteer officer—his discharge or mustering out, &c. In the case of a *soldier*, it begins with his enlistment[3] or muster into the service, and ends with his discharge or muster-out.[1] In other words, the general rule is that *military persons*—officers and enlisted men—are subject to the military jurisdiction, so long only as they remain such; that when, in any of the recognized legal modes of separation from the service, they cease to be military and become *civil persons*, such jurisdiction can, constitutionally, no more be exercised over them than it could before they originally entered the army,[2] or than it can over any other members of the civil community.

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[1] That conscripts are not militia but a part of the Army, see also Burroughs *v.* Peyton, 16 Grat., 483; Cooley, Prins. Const. Law, 89.

[2] Instances of "drafted men," tried as such by general court-martial, for desertion in failing to report under the draft, &c., are especially frequent in the G. O. of the Depts. of the East, of Pennsylvania, of the Susquehanna and the Monongahela, and of the Middle Dept., from 1863 to 1865.

[3] 1 Opins., 277-9.

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[1] The acceptance, almost uniformly indicated by an express official communication to that effect, may, it has been ruled by the Attorney General, be evidenced by the officer's taking the oath of office required by Secs. 1756 and 1757, R. S., which act—it is held—will constitute a sufficiently formal and legal acceptance. 19 Opins., 283.

In the case of an officer appointed during a recess of the Senate, but whose appointment is not subsequently acted upon and confirmed thereby, the amenability continues from his acceptance of his appointment to the last day of the session of the Senate next succeeding. (Const., Art. II., secs. 2 & 3; 4 Opins. At. Gen., 30.) The appointment, however, of an officer appointed during a recess may be recalled by the President without being submitted to the Senate, (8 Opins., 380,) and the appointment of any officer may be withdrawn after it has been submitted to the Senate, but before it is finally acted upon. In such cases the jurisdiction would cease with the recall or withdrawal.

[2] The early English ruling in Sackville's Case, (1760,) to the effect that an officer, after having been dismissed the service and become a civilian, could, at his own request or with his consent, legally be brought to trial by a general court-martial, has not been followed in the later English law, and has never been adopted in our own. (See DIGEST, 323.) In our practice no trial of a dismissed officer has ever been had, except by the authority of some express statutory provision, such as the last clause of the 60th Article of War. In the author's opinion, any such statute must necessarily be unconstitutional, and such trial inoperative. See *post*.

An officer who has been dropped from the rolls for desertion under Sec. 1229, Rev. Sts., is assimilated to a dismissed officer in that he cannot thereafter be made amenable to trial by court-martial. See G. C. M. O. 16, War Dept., 1871. An officer of the army whose office has been vacated by operation of law, as under Sec. 1222 or 1223, R. S., ceases of course to be so amenable.

[3] It should be noted that it is not necessary that the enlistment be a formal one, but that receipt of pay, performance of service as a soldier, &c., may be equivalent to, or constitute evidence of enlistment. See DIGEST, 384–5; Grant *v.* Gould, 2 H. Black, 69; Tytler, 111; Prendergast, 39; Clode, M. L., 93; also, *post*, chapter XXV—FORTY-SEVENTH ARTICLE.

Jurisdiction after end of Term of Service but before Discharge. While the soldier, since he cannot discharge himself, is in general entitled at the expiration of his term of enlistment to be forthwith discharged in the form and by the authority prescribed by the 4th article of war,[3] there are yet cases where, for offences previously committed, he may be held for trial by court-martial for a period after his term is completed, but before actual discharge, his right of discharge being meanwhile suspended. These cases are as follows:

1. Cases of deserters under Art. 48. This Article, in providing that—"*Every soldier who deserts the service of the United States shall be liable to serve for such period as shall, with the time he may have served previous to his desertion, amount to the full term of his enlistment,*" goes on to declare—"*and such soldier shall be tried by a court-martial and punished, although the term of his enlistment may have elapsed previous to his being apprehended and tried.*" The effect of this Article, (which is fully considered in Chapter XXV,) is to continue the jurisdiction of a general court-martial over a *deserter*, without regard to the duration of his term of enlistment, provided of course the statutory limitation of Art. 103 has not taken effect.

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[1] The discharge must of course be due and legal, not fraudulent. See 16 Opins. At. Gen., 349; Circ. No. 4, (H. A.,) 1888.

[2] DIGEST, 323–324. And see the principle, that the jurisdiction ends with the discharge—whether honorable or under a sentence—recognized in the following General Orders: G. C. M. O. 4, 16, War Dept., 1871; G. O. 42, Dept. of the East, 1865; Do. 43, Middle Dept., 1865; Do. 90, Dept. of Pa., 1865; Do. 101, Dept. of Va., 1865; Do. 22, Dept. of the Mo., 1866; Do. 23, Dept. of Dakota, 1871; Do. 55, Dept. of Cal., 1873; and in 5 Opins. At. Gen., 58–9.

[3] DIGEST, 20. And see U. S. *v.* Travers, 2 Wheeler, C. C., 509, (Story J.;) Prendergast, 42; also, *post*, Chapter XXV.—FOURTH ARTICLE.

It need hardly be added that here, as in other cases of soldiers liable to trial, the Government may by its own act, *i. e.*, by a formal discharge of the soldier, (under Art. 4,) terminate his amenability under the Article.[1]

2. *Deserters whose enlistment was illegal.* It has been ruled in a series of adjudged cases[2] that, even if an enlistment be voidable for illegality, (as in the instance of a minor enlisted under the legal age,) yet if, after the enlistment, the soldier becomes a deserter, he may, upon arrest, be held, tried and punished for his offence, and an application by a parent for his discharge made to the Secretary of War, or on *habeas corpus* to a U. S. court, will not properly be granted. In such cases the military jurisdiction is sustained for the reason that the interest of the public in the administration of justice and maintenance of military discipline is paramount to the right of the individual.

3. *Offenders in general—Attaching of jurisdiction.* It has further been held, and is now settled law, in regard to military offenders in general, that if the military jurisdiction has once duly *attached* to them previous to the date of the termination of their legal period of service, they may be brought to trial by court-martial after that date, their discharge being meanwhile withheld. This principle has mostly been applied to cases where the offence was committed just prior to the end of the term. In such cases the interests of discipline clearly forbid that the offender should go unpunished. It is held therefore that if before the day on which his service legally terminates and his right to a discharge is complete, proceedings with a view to trial are commenced against him,—as by an arrest or the service of charges,—the military jurisdiction will fully attach, and once attached may be continued by a trial by court-martial ordered and held after the end of the term of the enlistment of the accused. The leading adjudication on this point is that of the Supreme Court of Massachusetts in *In re* Walker,[3] (1830,)—a case of a seaman in the navy, but the ruling in which is equally applicable to soldiers of the army. Here the court, in adverting to the injurious results that might ensue were such a person permitted to be guilty with impunity of grave offences on the last days of his engagement, adds:—"It is true that a seaman is not bound to do service after the expiration of his term of enlistment. But within that term he is bound to observe the rules and regulations provided by law for the government of the navy, and is punishable for all crimes and offences committed in violation of them during his term of service. * * * In this case the petitioner was arrested or put in confinement, and charges were preferred against him to the Secretary of the Navy, before the expiration of the time of his enlistment; and this was clearly a sufficient commencement of the prosecution to authorize a court-martial to proceed to trial and sentence, notwithstanding the time of service had expired before the court-martial had been convened." This case, since affirmed in principle by other rulings,[1] has always been regarded as controlling authority in the military practice.

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[1] DIGEST, 43, 324.

[2] See cases cited in Chapter XXV., under THIRD ARTICLE, where this subject is fully treated.

[3] 3 Am. Jur., 281. And see DIGEST, 324-5.

Jurisdiction during Absence on Leave or as a Prisoner of War. Here should be noticed a class of cases in which an officer or soldier, though fully in the service, is, in a measure, not subject to the military jurisdiction.

Thus, when an officer or soldier is duly absent from his post or station upon a leave of absence or furlough, he ceases for the time to be subject to the orders of his commander,[2] or indeed to any orders except—in the event of some public exigency or grave occasion requiring his services—an order discontinuing his leave and directing him to return to his regiment, &c., or otherwise disposing of him as the public interest may require. During the pendency of his leave, therefore, he cannot well be guilty of a breach of the discipline of the command from which he is absent, or of a neglect of duty, or disobedience of orders, (except as above indicated,) or mutiny, or subject to a military trial therefor.[1] So, if he commit a crime or offence against the laws of the land, he will not in general properly be triable for the same by a military tribunal, but will be amenable therefor to the civil authorities in the first instance and without any previous application by them to a military commander for the surrender of his person under the 59th article of war.[2] But for an act not involving insubordination or failure to comply with a lawful order, but which—in case of an officer—is "unbecoming an officer and a gentleman," or—in a case of officer or soldier—constitutes an offence of the class specified in the 60th article of war, the offender, though on leave at the time, may in general legally be held subject to military jurisdiction and trial.

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[1] See U. S. *v.* Travers, 2 Wheeler, C. C., 509; In the matter of Dew, 25 Law Rep., 540; *In re* Bird, 2 Sawyer, 33; Barrett *v.* Hopkins, 2 McCrary, 129, and 7 Fed., 312. In the last case, where the term of enlistment of the soldier expired after his arrest, but before he was brought to trial, it is well remarked that—"the jurisdiction of the court having once attached by the arrest, it retained jurisdiction for all the purposes of the trial, judgment and execution."

[2] "Out of command and out of service are different things in a military sense. An officer on furlough is out of command, absent from the army," though "not out of the service." Cushing, 6 Opins., 252. "An officer on leave has, for the time being, no post or duty." 13 Id., 527. And see the recognition of the difference between the status of being on duty and that of being on furlough or leave of absence—in J. R. of April 12, 1866.

So a prisoner of war, though not subject, while held by the enemy, to the discipline of his own army, would, when exchanged or paroled, be not exempt from liability for such offences as criminal acts or injurious conduct committed during his captivity against other officers or soldiers in the same status.[3]

Exceptions to the General Rule—Amenability after Discharge. To the general rule above indicated, that the military jurisdiction ends with the discharge, &c., of the officer or soldier, there are several *exceptions*, created by or held to result from certain express statutory provisions. These statutes are the Sixtieth Article of war, and Secs. 1230, 1361, 4824, and 4835, Rev. Sts.

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[1] DIGEST, 29, 329. He may of course commit and become amenable for a *desertion*, an offence not unfrequently by soldiers when on furlough.

[2] *Ex parte* McRoberts, 16 Iowa, 603; G. O. 29, Dept. of the Northwest, 1864; DIGEST, 52, note.

[3] See an instance in G. C. M. O. 425, War Dept., 1865, of an officer convicted of an offence of this character committed while held as a prisoner of war at Danville, Va.

It need hardly be added that a prisoner of war *on parole* is subject to the military jurisdiction for such military offences as, under the terms or circumstances of his parole, he may be called to account for. In Gen. Burgoyne's case, it was held that, while he was in the status of a prisoner of war on parole in England, he was not subject to trial for acts committed in America before the capitulation at Saratoga. Simmons § 64. The opposite would probably now be held in a similar case in our army.

The Sixtieth Article. This Article, which is a statute for the punishment of certain frauds, embezzlement and conversion of public property, &c., when committed by military persons, after defining the offences to which it relates, concludes as follows:—"*And if any person, being guilty of any of the offences aforesaid, while in the military service of the United States, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial, in the same manner and to the same extent as if he had not received such discharge nor been dismissed.*"

A similar Article is contained in the naval code, the original of the statute being a general enactment of March 2, 1863, in terms applicable to army, navy and civilians alike.[1]

The amenability to prosecution and trial created by this provision is not unlimited as to time, but is subject to the restriction imposed by Art. 103.[2] Instances of trials ordered under it have been unfrequent in practice.[3] None have occurred in the army for more than twenty years.

Sec. 1230, Rev. Sts. This section, under which an officer once dismissed by order of the President may be allowed a trial by court-martial for the offence for which he was dismissed, has already been considered, in Chapter VI, in treating of the authority of the President to convene courts-martial. As has been seen, it is a provision originally enacted in time of war, and which, under the existing law, applies only to cases arising in war.

Sec. 1361, Rev. Sts. By this statute a further exception to the above general rule has been in effect created in cases of soldiers confined in the Military Prison at Leavenworth, Kansas, under sentences which imposed dishonorable discharge in connection with confinement, and who accordingly have been formally discharged in fact, prior to being imprisoned. The section provided that all persons confined under sentence in said prison "*shall be liable to trial and punishment by courts-martial under the rules and articles of war for offences committed during the said confinement.*" It applies only to the particular place of confinement mentioned—has no application, for example, to the prison at Alcatraz Island, California.[1] Trials of discharged soldiers under confinement have been had from time to time under this provision; the accused, who are really *civilians*, being designated in the proceedings as "military convict," or "military prisoner."[2]

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[1] See Secs. 5438, 5439, Rev. Sts. The 60th Art. is treated of in Chapter XXV.

[2] See Chapter XVI.

[3] Cases of such trials are to be found in G. C. M. O. 16, War Dept., 1871; G. O. 35, Div. West Miss., 1865, Do. 22, Dept. of the Mo., 1866; Do. 13, Dept. of the South, 1867; also in G. O. 143, Navy Dept., 1869.

Secs. 4824 and 4835, Rev. Sts. By the former of these statutes the inmates of the "Soldiers' Home," who are mostly discharged soldiers of the army, are made "subject to the rules and articles of war in the same manner as soldiers in the army." By the latter, the inmates of the "National Home for Disabled Volunteer Soldiers," who are all discharged officers or soldiers of volunteers employed during the late war, are made similarly subject "in the same manner as if they were in the army." In practice, however, courts-martial are not resorted to for the discipline of these classes of persons.[3]

The provisions of the five statutes here specified, so far as they subject civilians to trial by court-martial, are in the opinion of the author, clearly *unconstitutional.* They will be recurred to later in this chapter, and the question of their constitutionality specifically considered.

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[1] DIGEST, 327; G. C. M. O. 55, Dept. of Cal., 1873.

[2] Repeated instances of such trials, principally for escape, attempted escape, and insubordinate conduct, are to be found in the G. C. M. O., Dept. of the Missouri, since 1875. In Circ. No. 4, (H. A.,) 1888, is published a ruling to the effect that Sec. 1361 does not include offences committed after discharge, but before the commencement of the confinement in the Military Prison.

[3] But one trial is known to have ever been had. This proceeding—as absurd in fact as it was unwarranted in law—is described in DIGEST, p. 329–30. That the inmates of the Volunteer Homes are not in the military service was specifically ruled in U. S. *v.* Murphy, 9 Fed., 26. And see DIGEST, 744–5.

Jurisdiction after a Second Appointment or Enlistment. It remains to refer to the effect, *per se*, of a subsequent appointment or enlistment of an officer or soldier, (once duly dismissed, resigned, &c., or discharged,) upon his amenability to trial for an offence committed prior to such discharge, &c., (and within two years,) but not yet made the subject of a charge or trial. Upon this point there is not known to have been any adjudication. Putting out of the question the class of offences, the amenability for which is expressly defined by the 60th article, it is the opinion of the author that, in separating in any legal form from the service an officer or soldier or consenting to his separation therefrom, and remanding him to the civil status at which the military jurisdiction properly terminates, the United States, (while it may of course continue to hold him liable for a pecuniary deficit,) must be deemed in law to waive the right to prosecute him before a court-martial for an offence previously committed but not brought to trial. In this view, a subsequent re-appointment or re-enlistment into the army would not revive the jurisdiction for past offences, but the same would properly be considered as finally lapsed.[1]

Jurisdiction as Affected by Amenability to Civil Proceedings—*Double Amenability*.—That the offender may be amenable to a criminal court of the United States or of a State, by reason of such court having concurrent jurisdiction of his offence, or jurisdiction of a civil offence involved in the act committed, or that he may actually have been tried by such court for such offence, cannot affect the exercise of jurisdiction by the court-martial. This principle and its converse—that liability to trial or actual trial by court-martial does not affect the liability of the party to civil trial or suit, for a civil offence or cause of action included in the act—were first fully impressed upon the army by the cases (of homicide) of Capt. Howe and Asst. Surgeon Steiner,[2] and have been abundantly illustrated in subsequent rulings and Orders. That a *double amenability* exists in all cases in which the officer or soldier, (who, in becoming subject to military discipline, has not discharged himself from the liabilities of the citizen,) has, by his criminal act, offended against both the civil and the military code, is now established law.[1] The offender in such a case is two distinct persons, each of whom has committed a distinct offence. Thus where officer or soldier has been guilty of an act of offence having both a civil and a military aspect and quality, as where he has committed a homicide, robbery, battery, forgery, or theft against the person or property of another officer or soldier, or an embezzlement or larceny of public money or larceny at a military post, or a breach of the peace which has also prejudiced military discipline, his trial for and conviction or acquittal of the civil offence by a civil court of the State or of the United States, will not impair or affect the authority of a court-martial to take cognizance of the military crime or disorder, or offence against discipline, involved in his unlawful act. Where indeed the civil jurisdiction is the first to be initiated, the *court-martial* cannot properly take cognizance of the military offence till the party is wholly discharged from the civil proceeding;[2] but its jurisdiction remains unimpaired, and may be freely exercised at the proper time, whether the accused may have been acquitted or convicted by the civil court. On the other hand, if military proceedings have been first commenced, and the case has been once duly taken cognizance of by a court-martial, the civil jurisdiction is suspended, and the trial by the military court is not subject to be interrupted, and should not be deferred by any process or action of the civil court or authorities.[1]

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[1] DIGEST, 324, 331, 654.

[2] G. O. 25 of 1840; 6 Opins. At. Gen., 413, 506; 8 Id., 328.

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[1] *Ex parte* McRoberts, 16 Iowa, 606; U. S. *v.* Carr, 1 Woods, 386; *Ex parte* Mason, 105 U. S., 699; U. S. *v.* Cashiel, 1 Hughes, 552; *In re* Esmond, 5 Mackey, 64; U. S. *v.* Barnhart, 22 Fed., 285; U. S. *v.* Clark, 31 Fed., 712, 715; People *v.* Porter, 50 Hun., 161; State *v.* Rankin, 4 Cold., 145; State *v.* Rogers, 37 Mo., 367; *In re* O'Connor, 37 Wisc., 379; Oregon *v.* Colman, 1 Or., 191; State *v.* Brown, 2 Or., 224; People *v.* Sheffield, Dist. Ct. Utah, Nov., 1893; G. C. M. O. 20 of 1869; G. O. 28 of 1894, (case of Lieut. Maney;) G. C. M. O. 50, Dept. of the Mo., 1871; Do. 287, Dept. of the East, 1885; Do. 12 Id., 1894: G. O. 78, Id., 1869; Do. 69, Id., 1870; Do. 52, Dept. of the Pacific, 1865. And compare cases, of double amenability to Federal and State jurisdiction for the same act, of Moore *v.* Illinois, 14 Howard, 13; *Ex parte* Robinson, 6 McLean, 355; also cases of similar amenability for contempts—as Gen. Houston's case, 2 Opins. At. Gen., 655; State *v.* Yancey, 1 No. Ca. Law Rep., 519.

[2] 3 Opins., At. Gen., 460. In the case of *In re* Wall, 8 Fed. Rep., 85, a soldier was tried and sentenced by a court-martial while in the constructive custody of the U. S. District Court, under a writ of *habeas corpus;* the officer who had him in charge not thinking it worth while to inform the court-martial that the civil proceedings were pending. "This couduct," observes the District Judge, "was highly reprehensible." In Capt. Howe's case, (*ante*,) the action of the court-martial was suspended for more than two years, while the civil proceedings (first initiated) against the accused were pending.

The subject of *double amenability* will be recurred to and further illustrated later in the work.[2]

II. THE MILITIA WHEN CALLED INTO THE SERVICE OF THE UNITED STATES.

Occasions of Amenability. Under the subject of the Composition of General Courts-Martial, we have seen what the militia is, and have referred to the series of statutes regulating its organization, service, &c. It remains to consider when and how officers and soldiers of the militia become amenable to the jurisdiction of courts-martial of the United States.

The statute law and the judicial decisions recognize two occasions upon which this amenability attaches, viz. (1) when the militia, being actually employed in the federal service, "in time of war or public danger,"[3] commit military offences; and (2) when they commit the offence of refusing to be so employed. There is a marked distinction between the two instances, from the fact that in the one the militia are a part of the military forces of the United States and subject to the articles of war, while in the other they are no part of such forces and not so subject.[4]

1. Amenability when in the U. S. Service. The Constitution, as we have seen, empowers Congress to "provide for governing such part" of the militia "as may be employed in the service of the United States." The Act of Feb. 28, 1795, in execution of this power, provided, (sec. 4,) "*that the militia employed in the service of the United States shall be subject to the same rules and articles of war as the troops of the United States*," and this provision, repeated in substance in the Act of July 29, 1861, is now embraced in Sec. 1644 of the Revised Statutes and in the 64th article of war. The question as to when the militia should be regarded as legally in the employment of the United States was, at an early period, (1820,) settled by the Supreme Court in the leading case of Houston *v.* Moore,[1] in which, (with reference to the war of 1812,) it was held that the mere calling forth did not constitute an employment of the militia in the public service, and that they did not become "so employed" until their arrival at the place of rendezvous and muster. From this point it was—as determined by the court—that their character was changed from that of State to that of National militia, that they were brought under the command of the President as constitutional "commander-in-chief of the army and navy of the United States and of the militia of the several States when called into the *actual* service of the United States," and that they became subject to the federal military code.[2]

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[1] See Circ. No. 1, (H. A.,) 1886.

[2] See Chapter XVI.—"Plea of Former Trial;" also Part III.

[3] Constitution—Vth Amendment.

[4] In Senate Bill, No. 2537, of March 9, 1892—"To promote the efficiency of the Militia," was an excellent provision to the effect that the militia, when called into the service of the United States, "shall be held to be in such service, and every officer or enlisted man of such militia who shall refuse or fail to obey such call shall be subject to trial by court martial;" thus doing away with the undesirable distinction made by the existing law. Compare p. 129, *post*. It is to be regretted that such provision was not enacted.

The ruling in Houston *v.* Moore has been affirmed by subsequent rulings and opinions,[3] in which it is the more distinctly laid down that it is *the formal muster into the U. S. service at the place of rendezvous* which properly constitutes the legal evidence of the commencement of the employment of this force. That the proceeding of muster-in is, regularly, the proper starting point of the service is indeed made quite apparent by the express language of the provision of the Act of July 17, 1862, now incorporated in Sec. 1648 of the Revised Statutes, that "the militia so called shall be mustered in," &c. It is therefore from the muster-in that the *amenability* under consideration properly begins.

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[1] 5 Wheaton, 20.

[2] It may here be noted that a considerable number of cases of trials of *militia* officers and soldiers by courts-martial during the late war are published in the General Orders of that period. A large proportion will be found in the Orders of the Department of the Missouri; the Governor of Missouri having been specially authorized by the President, in November, 1861, (by G. O. 96, War Dept.,) to raise a force of State militia to serve during the war within the State. See, for example, cases in the following Orders of Dept. of the Mo: G. O. 31 of 1862; do. 10, 15, 84, 94, 98, 104, 112, 141, of 1863; also G. O. 38, Dept. of the Tenn., 1863.

[3] Kneedler *v.* Lane, 45 Pa. St., 238; McCall's Case, 5 Philad., 261; Antrim's Case, Id., 278; People *v.* Campbell, 40 N. Y., 135; Tyler *v.* Pomeroy, 8 Allen, 493; Story, Const., § 1213; 3 Opins. At. Gen., 691; 10 Id., 14, 282.

The term of liability—Form of discharge. The status thus initiated continues till the period of discharge. In the Act of 1861, above referred to, it was directed that the militia should serve "until discharged by proclamation of the President;" in the provision of 1862, repeated in Sec. 1648, Rev. Sts., it was declared that they should serve for the period, (not exceeding nine months,) specified in the call, "unless sooner discharged by command of the President." The form of the order of discharge is not material provided it issue by the authority of the President, though communicated by a subordinate commander. Thus an order proceeding from such authority, which directed certain militia, upon being mustered and without being required to serve, to disband and return to their homes, was held by Atty. Gen. Legaré[1] "a virtual discharge from actual service." The usual mode, however, of discharging militia during the late war was similar to that pursued in the case of volunteers—a formal muster-out, accompanied by written discharges.[2]

2. Amenability for Refusing to Comply with the Call. The Act of 1795 provided that an officer or soldier of militia who should fail to obey the orders of the President calling the militia into the public service should incur a certain forfeiture and become liable to certain other punishment, "to be determined and adjudged by a court-martial." This provision, substantially repeated in the enactment of 1861, has been reproduced in Sec. 1649, Rev. Sts. The question which it suggests is—what kind of court-martial is intended, and this question has been passed upon and settled by the highest authority. In the case of Houston *v.* Moore[3] heretofore cited, it was held by the Supreme Court that, though the mere calling forth of the militia did not bring them into the public service, or render them subject to the articles of war, a militiaman who refused to obey the call was yet guilty of a military offence against the United States, for which, under the provision of the Act of 1795, he was triable and punishable by a court-martial of the United States, composed of course of militia officers. This ruling, affirmed in Martin *v.* Mott,[1] recognizes a peculiar jurisdiction having a source quite different from that exercisable over the militia after it has become a part of the national forces. This source is found in the power of Congress to provide, not for governing the militia but for calling them forth, and in the further general power "to make all laws which shall be necessary and proper for carrying into execution" its specific powers. In asserting the authority of Congress to establish this jurisdiction by its enactment of 1795, Chief Justice Marshall, in an early case,[2] observed:—"In the execution of this power," (the power 'to provide for calling forth the militia,') "it is not doubted that Congress may provide the means of punishing those who shall fail to obey the requisitions made in pursuance of the laws, and may prescribe the mode of proceeding against such delinquents and the tribunal before which such proceedings should be had." That the exceptional jurisdiction[3] thus created is quite other than that first above specified, and which is exercised over the militia similarly as over the Army of the United States, is illustrated by the fact, heretofore noticed, that the courts-martial, (authorized by Sec. 1649, Rev. Sts.,) for the trial of militiamen for disobeying the call, are not necessarily governed by the code of articles of war. This is indicated in Martin *v.* Mott,[4] where it was held that the matter of the composition of such courts, so far as respects the

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[1] 3 Opins., 687.

[2] See Mustering Regulations in G. O. 108 of 1863.

[3] 5 Wheaton, 1, 25, 64–66.

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[1] 12 Wheaton, 19, 34. And see Meade *v.* Depty. Marshal of Va., 1 Brock, 324; Moore *v.* Houston, 3 S. & R., 169; Com. *v.* Irish, Id., 176; Duffield *v.* Smith, Id., 590. It is to be noted that the doctrine of the U. S. Supreme Court, as stated in the text, overrules that of the Supreme Court of New York in Mills *v.* Martin, 19 Johns., 7, and Rathbun *v.* Martin, 20 Johns., 343, in which it was held that a *State* militia court was intended by Sec. 5 of the Act of 1795, (R. S., Sec. 1649.) and could alone take cognizance of the offence therein contemplated, the delinquent not being subject to the articles of war.

[2] Meade *v.* Depty. Marshal, 1 Brock, 326.

[3] Remark the provision, referred to in note on p. 126, of a Bill introduced in Congress, March 9, 1892, by which this exceptional jurisdiction is avoided by making the militia a part of the U. S. forces, *upon being called out.*

[4] 12 Wheaton, 35.

number of the members, was not required to be regulated by the article, (now the 75th,) on that subject. And the court say, referring to the articles in general,—"If any resort is to be had to them, it can only be to guide the discretion of the officer ordering the court, as matter of usage and not as matter of positive institution."

That the offence which shall subject an officer or soldier of militia to the jurisdiction under consideration must consist in a refusal or neglect to obey the order of the President, and that a refusal to obey an order emanating merely from a Governor of a State will not render the delinquent so amenable, is shown by Atty. Gen. Wirt in an early opinion.[1]

Term of the jurisdiction. It was held in Martin *v.* Mott,[2] that "a court-martial regularly ordered for the trial of a delinquent militiaman under the Act of 1795 did not expire with the end of a war existing when it was convened, its jurisdiction to try such offence not being dependent upon the fact of war or peace." It was added:—"It would be a straitened construction of the Act to limit the authority of the court to the mere time of the existence of the particular emergency, when it might be thereby unable to take cognizance of and decide upon a single offence. It is sufficient to any that there is no such limitation in the Act itself."

III. Marines Detached for Service with the Army.

Nature of the Jurisdiction. It is provided by Sec. 1621, Rev. Sts., that the "*marine corps, when detached for service with the army, by order of the President,* * * * *shall be subject to the rules and articles of war prescribed for the government of the army.*" The relation of the corps to the army, and the amenability of its officers and men to trial by courts jointly made up of regular and marine officers, are recognized in the 78th article of war, and have already been considered in the Chapter on the Composition of Courts-Martial. It need only be added that such amenability during the continuance of the detached service will be substantially of the same quality as if the offenders were members of the army proper: further, that while the jurisdiction for the trial and punishment of offences committed pending such service will most readily and appropriately be exercised before the same be terminated, it may legally be exercised within a reasonable period thereafter, provided it has regularly attached by the due commencement of proceedings before.

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[1] 1 Opins., 473.

[2] 12 Wheaton, 37.

IV. CIVILIANS SUBJECTED TO MILITARY DISCIPLINE IN TIME OF WAR.

Statutes Authorizing Jurisdiction. The class now to be considered are persons whose liability to military government and trial by court-martial arises only in time of war, and is the result solely of the exceptional relations and obligations prevailing during a state of war. The statutes by which courts-martial, which, as has been seen, receive all their jurisdiction from statute, are empowered to take cognizance of offences of civilians in time of war, are the 63d, 45th and 46th articles of war, and Sec. 1343, Rev. Sts., which is also an article of war.[1]

1. Under Art. 63. This Article, which is the most important and comprehensive of the statutes indicated, provides as follows:—"*All retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and dis-*

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[1] Here may be noticed certain statutes, no longer in force—*viz:* the Acts of July 17, 1862, c. 200, s. 16; of July 4, 1864, c. 253, s. 6, 8; and of July 16, 1866, c. 200, s. 3—by which certain civilians, to wit, contractors for arms, munitions and supplies for the army, (and navy,) inspectors in the quartermaster department, and civil officials and agents of the Bureau for the relief of Freedmen and Refugees, were made amenable to the military jurisdiction during the period of the late war. Cases of trials, convictions, &c., by courts-martial, of *army contractors* for frauds, neglects, &c., are published in the following Orders: G. O. 375 of 1863; G. O. and G. C. M. O. 3, 147, 166, 181, 212, 223, 322, 345, 375, of 1864; G. C. M. O. 382 of 1865; G. O. 167, 186, Dept. of the Ohio, 1863; Do. 62, Northern Dept., 1864; Do. 46, Dept. of the Susquehanna, 1864; Do. 3, Mil. Dist. of Ky., 1865; Do. 54, Dept. of La., 1865; Do. 47, Middle Dept., 1865; Do. 19, Dept. of Tenn., 1866. And see G. C. M. O. 614 of 1865; G. O. 114, Dept. of Washington, 1865, for proceedings of trials of *inspectors;* and G. O. 75, Third Mil. Dist., for a case of a trial of an *agent* of the above-mentioned Bureau.

As to the constitutionality of this class of statutes, especially of the enactment relating to *contractors*, see *post.*

cipline of war." This provision, which, with some slight modifications,[1] has come down from our original code of 1775, which derived it from a corresponding British article, has always been interpreted as subjecting the descriptions of persons specified, not only to the orders made for the government and discipline of the command to which they may be attached, but also to trial by court-martial for violations of the military code.[2] Protected as they are by the military arm, they owe to it the correlative obligation of obedience; and a due consideration for the *morale* and discipline of the troops, and for the security of the government against the consequences of unauthorized dealing and communication with the enemy, requires that these persons shall be governed much as are those with whom they are commorant.[3] Owing indeed to the policy of our laws relating to the army, which has aimed to impress, in general, a distinctive military character—as officers and enlisted men—upon the persons employed in the military service proper, the classes of *attachés* mentioned in the Article have been less varied and numerous in our armies than in those of foreign nations. In our late war, however, they were necessarily more considerable than at any previous period.

"Retainers to the camp." This term may be deemed to include:—1. Officers' servants; 2. Camp-followers attending the army but not in the public service. Of the former, there have been but few trials by court-martial,[4] their breaches of discipline having been in general summarily punished by expulsion from the station or beyond the lines.[1] Of followers of the camp—sutlers,[2] sutlers' employees,[3] newspaper correspondents,[4] telegraph operators,[5] and some others,[6] were from time to time during the late war brought to trial by court-martial, or otherwise summarily disciplined.[7] The post-traders who succeeded sutlers[8] would, in time of war, have been of the class of camp-followers if their posts had been within the theatre of the war. Camp-followers are generally restricted to the least number, on the eve of an important movement by the army to which they are attached.[1]

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[1] The principal was the omission in the code of 1874 of the mention of *sutlers*.

[2] See Samuel, 691–697; Hough, 596–598; Simmons, § 71; Maltby, 31; O'Brien, 151; De Hart, 22; G. O. 175 of 1864; DIGEST, 148.

[3] See the authorities cited in the last note; also Com. *v.* Gamble, 11 S. & R., 93; Foucher, Commentaire sur le Code de Justice Militaire, 177. And note in this connection the case of *Ex parte* Van Vranken, 47 Fed., 890, where "clerks of naval officers on duty on shipboard on a voyage" are assimilated as to naval discipline and jurisdiction to officers and men of the navy, "because of the necessity of absolute discipline on a ship at sea, where there cannot, in the nature of the case, be one law for one class of those on board and another law for another class." And see Johnson *v.* Sayre, 158 U. S., 109.

[4] See case in G. C. M. O. 139 of 1864, of an officer's servant tried for stealing from the mail; also in Do. 29, Army of the Potomac, 1864, of one tried for selling liquor to soldiers. Samuel, p. 695, cites a case of an officer's servant sentenced to death, for robbery, by a court-martial.

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[1] This punishment has also been imposed, summarily as well as by sentence, upon the other classes of persons who are the subjects of the Article. See *post.*

[2] See G. C. M. O. 164 of 1864; Do. 9, Army of the Potomac, 1865; G. O. 13, 132, Dept. of Washington, 1865. Sutlers were also sometimes expelled in orders without trial. See G. O. 87, Army of the Potomac, 1863; Do. 11, 21, Mountain Dept., 1862. Compare Hough, (P.) 823, as to the expulsion of sutlers from the French army in the Crimea by an order of Gen. Canrobert for selling to the soldiers "adulterated and unwholesome beverages."

[3] G. O. 76, Dept. of Washington, 1865. And see G. C. M. O. 12, Army of the Potomac, 1865.

[4] See cases of newspaper-correspondents tried for making unauthorized publications—in G. O. 10, Dept. of Washington, 1863; Do. 29, Army of the Potomac, 1863; Do. 13, Dept. of the Tenn, 1863. In G. O. 39, Div. West Miss., 1864, two correspondents of the New York Herald and Tribune, respectively, were ordered to be sent beyond the lines for a similar offence. In G. O. 48, Army of the Potomac, 1863, all correspondents not complying with a certain order in regard to publications are directed to be excluded from the lines.

[5] In G. C. M. O. 29, Army of the Potomac, 1864, two telegraph operators are ordered to be sent beyond the lines.

[6] See a case of an employee of the U. S. Sanitary Commission sentenced to imprisonment, on conviction of selling liquor to soldiers—in G. O. 45, of 1864.

[7] Members of the families of soldiers or officers, commorant with the army, would be amenable as camp-followers. Simmons § 71, note, cites the case of Hannah Fitchet, a soldier's wife, convicted of manslaughter by a general court-martial in India in 1825. That the *wife of an officer* may be triable by court-martial as a camp-follower, see Hough, (P.) 629.

[8] Post-traders are here referred to as persons in the *past* because of the recent Act of January 18, 1893, providing for the gradual doing away with them by the not filling of vacancies. The post-trader's store had meanwhile been in a measure superseded by the "CANTEEN," established by G. O. 10 of 1889, which has since, (G. O. 11 of 1892,) given place to the "POST EXCHANGE."

"Persons serving with the armies in the field." While this might perhaps be viewed as a general designation including all persons serving in the field with the army in any capacity, whether public or private, yet inasmuch as the terms "service" and "serving," as used in the Articles of war, have reference to public service—the service of soldiers and the like—it is preferred to treat these words as intended to describe civilians in the employment and service of the *government.*[2] This class, during the late war, was considerably more numerous than that of the camp-followers or private retainers. It consisted mostly of civilian clerks, teamsters, laborers and other employees of the different staff departments, hospital officials and attendants, veterinaries, interpreters, guides, scouts and spies, and men employed on transports and military railroads and as telegraph operators, &c.[3] Of these persons those who appear from the General Orders to have been most frequently subjected to trial by court-martial were—Inspectors, Teamsters, and other employees of the Quartermaster's Department;[4] Officials and employees of the Provost Marshal General's Department,[5] Contract surgeons and nurses,[6]

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[1] Thus, by an order of the Comdg. General of the Army of the Potomac, of April 8, 1864, only members of the Sanitary and Christian Commissions, and "registered correspondents," were allowed to remain with the army. All other civilians, including sutlers, were sent to the rear.

[2] Persons not in public employment are classed under the previous description of "retainers." See *ante.*

[3] See DIGEST, 75–6.

[4] See G. C. M. O. 392 of 1864; Do. 25, 614, 625, of 1865; G. O. 9, 64, 86, 114, Dept. of Washington, 1865; G. C. M. O. 22, 45, Army of the Potomac, 1864; Do. 4 Id., 1865; G. O. 20, Dept. of the Susquehanna, 1863; Do. 15, Dept. of Ark., 1864; Do. 17, Dist. of Oregon, 1864; Do. 53, Div. West Miss., 1864; Do. 63, Middle Dept., 1865; Do. 27, Dept. of the South, 1866; Do. 29, Dept. of La., 1866; Do. 15, Second Mil. Dist., 1868; Do. 2, 5, 65, Dept. of the Platte, 1869; G. C. M. O. 45, Dept. of the Mo., 1868. And see, generally, G. O. 175, War Dept., 1864.

[5] G. O. 353 of 1863; Do. 33, 43, and G. C. M. O. 271 of 1864; G. O. 60, Northern Dept., 1864; Do. 105, 199, Dept. of the Mo., 1864; Do. 27, Dept. of the East, 1865; Do. 62, Dept. of Pa., 1865.

[6] G. C. M. O. 373 of 1864; G. O. 58, Northern Dept., 1864; Do. 81, Dept. of Pa., 1864; Do. 163, Dept. of Washington, 1865.

Paymasters' clerks,[1] Officials of boards of enrolment,[2] Officers and men employed on steam transports,[3] Military telegraph operators,[4] &c.[5]

The Article to be strictly construed. This Article, in creating an exceptional jurisdiction over civilians, is to be strictly construed and confined to the classes specified.[6] A civil offender who is not certainly within its terms cannot be subjected under it to a military trial in time of war with any more legality than he could be subjected to such a trial in time of peace. As held by the Judge Advocate General,[7] the mere fact of employment by the Government within the theatre of war does not bring the person within the application of the Article. In several cases of public employees brought to trial by court-martial during the late war the convictions were disapproved on the ground that it did not appear that at the time of their offences they were '*serving with the army*' in the sense of this Article.[1]

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[1] G. O. 294 of 1863; Do. 72, Dept. of the Ohio, 1864; Do. 5, Dept. of West Va., 1864.

[2] G. C. M. O. 388 of 1864; Do. 1, 59, 386, of 1865.

[3] G. O. 7, 9, Dept. of Ohio, 1863; Do. 126, Dept. of the South, 1864; Do. 88, Div. West Miss., 1864; G. C. M. O. 26, Army of the Potomac, 1864; G. O. 40, Dept. of La., 1865.

[4] G. C. M. O. 29, Army of the Potomac, 1864; G. O. 109, Dept. of the Ohio, 1864; Do. 19, Div. West Miss., 1865.

[5] See cases of trials of employees of the subsistence, engineer and ordnance departments in G. C. M. O. 39 of 1865; G. O. 9, 24, 153, Dept. of Washington, 1865; Do. 25, Dept. of the Tenn., 1866; of an ambulance driver in G. C. M. O. 161, War Dept., 1864; an agent of the Freedmen's Bureau in G. O. 75, Third Mil. Dist., 1867; a veterinary surgeon in G. O. 36, Dept. of La., 1866; a scout in G. O. 19, Div. West. Miss., 1865; and of persons styled, generally, "Government employees" in G. C. M. O. 25 of 1865; Do. 22, Dept. of Ky., 1865; G. O. 118, Dept. of Washington, 1865; Do. 16, Dept. of Ark., 1865; Do. 23, Dept. of Tenn., 1866; Do. 68, Dept. of the Mo., 1866.

[6] As to the limits of the military jurisdiction exercisable under the *British* law over a similar class of persons, Clode, M. L., 95, well says: —"From what has been already written the reader perhaps need not be cautioned against supposing that all those who are resident or commorant within the Camp or Barrack are thereby rendered liable to trial by court-martial. Such a liability must be found upon the statute book in plain and explicit words leaving nothing to inference." And he adds, from the ruling of Chief Justice Best, in Looker *v.* Halcomb, 4 Bing, 189, that—"Any statute which takes away the right of trial by jury and abridges the liberty of the subject must receive the strictest construction," so that "nothing should be holden to come under its operation that is not expressly within the letter and spirit of the Act."

[7] DIGEST, 76.

Limits of its operation—Application to Indian Wars. Further, the use of the terms—"to the camp," "in the field," "according to the rules and discipline of war," is deemed clearly to indicate that the application of the Article is confined both to the period and pendency of war and to acts committed on the theatre of the war.[2] A period of hostilities with Indians is, equally with a period of warfare against a foreign power, a "time of war;"[3] and it has been specifically held by the Attorney General that civil employees of the War Department—"serving with the army in the Indian country during offensive or defensive operations against the Indians" are amenable to military trial for offences committed pending such service.[4] In cases indeed of offences alleged to have been committed during hostilities against Indians, it may not always readily be determined whether a *war* was in a proper sense pending at the date of the offence, or whether the *locus* of the offence was, properly speaking, the theatre of such a war.[5] In a case of a quartermaster's clerk arrested, upon a charge of fraud against the Government, while serving at a post in the proximity of an Indian Agency, and of a band of Indians a portion of whom had previously been hostile but with whom no hostilities whatever were at the time pending, it was held by the Judge Advocate General,[6] that the circumstances were not within the description or application of the Article, and this opinion was concurred in by the Attorney General.[1] In general indeed, the jurisdiction created by the Article should be extended with special caution over civilians serving with troops during an *Indian* war, for the reason that the theatre of such a war is commonly restricted in extent and that its duration is ordinarily but brief as compared with other wars.[2]

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[1] See instances in G. O. 9, Army of the Potomac, 1863; Do. 132, 153, Dept. of Washington, 1865; Do. 40, Dept. of La., 1865; G. C. M. O. 22, Dept. of Ky., 1865. Similarly, in a case adjudicated during the same period, it was held that an agent of the Confederate Treasury Dept., though acting upon the scene of hostilities, was not a 'person serving with the army' or subject to military trial; and he was accordingly released, upon *habeas corpus*, from military custody, after having been tried, convicted, and sentenced to death, by a court-martial. Confederate States *ex rel.* McKee *v.* Scully *et al.*, Sup. Ct., Confed. States, Sept., 1864. And see, as to the general principle involved, Antrim's Case, 5 Philad., 288.

[2] In 14 Opins., 22, it is remarked by the Atty. Gen. that "the words '*in the field*' imply military operations with a view to an enemy."

[3] 13 Opins. At. Gen., 31, 470.

[4] 14 Opins., 22.

[5] Note the situation as described in 14 Opins. At. Gen., 23, and also in 13 Id., 472.

[6] DIGEST, 76, 77.

Application to clerks of War Department, and the like, in time of peace. In view of the fact that this Article is operative only in and for a time of war, it need hardly be remarked that the mere fact that a civilian is serving, in time of *peace*, in connection with the military administration of the government,—as where he is a clerk of the War Department, or at a Military Division or Department headquarters,—will not be sufficient to subject him to military trial for offences committed during such service. This point was so held in 1877 by the Judge Advocate General in the case of Barth, a clerk in the office of the Chief Quartermaster Military Division of the Pacific, and, further, with regard to the Superintendents of National Cemeteries who are discharged soldiers and civilians.[3] In both cases the ruling was concurred in by the Attorney General.[4]

Term of the jurisdiction. It need only be added that the jurisdiction authorized by Art. 63 should properly be exercised, or at least initiated, during the *status belli.* Upon a declaration of peace, or other legal termination of hostilities, the Article is no longer operative, and the "discipline of war" cannot lawfully be applied thereunder.[1]

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[1] 16 Opins., 48.

[2] DIGEST, 76.

[3] DIGEST, 77.

[4] 16 Opins., 13. And see his later opinion in Crafts' case, Id., 48; also *Ex parte* Van Vranken, 47 Fed., 888.

The only case *contra* is that of John Thomas, (1 Chicago Legal News, 245,) a civilian clerk of an army paymaster in Mississippi in 1867, who was held by the U. S. Dist. Judge to be amenable to military trial for a fraud upon the United States. But this conclusion was determined by the fact that the State was then under military government, it not having yet been authoritatively decided by the Supreme Court that the war was legally ended. It may be noted in this connection that the rulings to the effect that *naval* paymasters' clerks were persons in the naval service and amenable to trial by court-martial, (U. S. *v.* Bogart, 3 Benedict, 257; *In re* Bogart, 2 Sawyer, 396; *Ex parte* Reed, 100 U. S. 13,) have recently been affirmed by the Supreme Court, in the case of Johnson *v.* Sayre, 158 U. S., 109, and anything *contra* in *Ex parte* Van Vranken, *ante*, must of course be regarded as overruled. But the clerks of *army* paymasters, like all other clerks connected with the *military* department of the government, are *civil* officials merely.

Arts. 45 and 46. These provisions of the Code declare that—"*Whosoever relieves the enemy with money, victuals, or ammunition, or knowingly harbors or protects an enemy;*" and "*Whosoever holds correspondence with, or gives intelligence to, the enemy, either directly or indirectly—shall suffer death or such other punishment as a court-martial shall direct.*"

Construction as to application to civilians. Whether the word "*whosoever*" is here employed in a general sense, and includes civil equally with military persons, is a question frequently discussed in cases arising during the late war, but which must be regarded as determined by the weight of reason and authority in the affirmative. The principal grounds for such determination may be stated as follows:—

1st. While all the other articles of the Code by which specific offences are denounced are so expressed as to apply *in terms* to military persons—as by the words "any officer who," "any soldier who," "any officer or soldier who," and the like, the persons to be affected by Arts. 45 and 46 are designated by a general and comprehensive term of description which may include persons without as well as within the army.

2d. In the only other case in which the word "whosoever" is employed, that of Art. 57, the same is qualified by the addition—"belonging to the armies of the United States." A similar qualification is perceived in Art. 44 which begins—"Any person belonging to the armies of the United States who," &c. It is a fair inference that where the qualification is absent the general term is intended to be unqualified.

3d. In their original form in the code of 1775, these Articles were phrased—"Whosoever belonging to the continental army," &c., a limitation taken from the corresponding British articles, then existing, which commenced—"Any officer or soldier who," &c. In the "additions" to this code, of November, 1775, was contained an article substantially identical with the second of the original articles, but substituting for the description there employed the general term—"All persons." In the code of 1776 the description in *each* of the original articles was changed to "Whosoever," a form retained without variation to the present time; the articles in other respects also remaining without substantial modification. It is a reasonable argument that, in abandoning the words of limitation first employed, it was intended by Congress that these statutes should not be restricted in their application to members of the army.

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[1] See DIGEST, 76. And compare 5 Opins. At. Gen., 58; 14 Id., 253.

4th. The contemporaneous construction of the articles as expressed in the code of 1776 appears to have been that they applied to cases of civilians. Thus, in May, 1777, a case of one John Brown, a civilian, convicted by a general court-martial of corresponding with the enemy in violation of art. 19, sec. 13, of 1776, (the present 46th Art.,) was reported to Congress and recorded in its journals.[1] Subsequently, by Resolution of Oct. 8, 1777,[2] it was declared by Congress that "any person" who should be guilty of giving intelligence or aid to the enemy should himself be "considered and treated as an enemy and traitor to these United States," and be triable by court-martial and subject to the death penalty or such other punishment as the court might think proper. This enactment was practically but a reiteration of the existing articles of war, while at the same time extending their application to certain forms of relieving and assisting the enemy not therein enumerated.

5th. That these Articles, upon their re-enactment, after the adoption of the Constitution, in the code of 1806, were similarly construed, appears from the military Orders for the "Army of West Lake Champlain," dated in 1813, in which the two articles are published for the information and warning of the civil community, as being "equally binding on the citizen as the soldier." In 1818, R. C. Ambrister, a civilian, was convicted by a court-martial convened by General, afterwards President, Jackson, (by whom also the finding and sentence were approved,) of aiding the enemy by "supplying them with the means of war,"[1] &c. Of the earlier writers on military law, while Maltby[2] was of opinion that the articles under consideration applied only to military persons, O'Brien[3] held that they were equally applicable to persons "in civil life."

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[1] 2 Journals, 135.

[2] 2 Journals, 281. See, with this, the Resolution, *in pari materia*, of Feb., 1778—2 Journals, 459—under which Joshua Hett Smith, the alleged confederate of Arnold and André, was brought to trial by court-martial in 1780. 2 Chandler, Crim. Trials, 185.

6th. Coming to the period of the late war—the view was expressed at an early date by Judge Advocate General Holt that civil persons were included within the general description of the two articles and amenable to trial thereunder.[4] This view was adopted by the Secretary of War, and announced in Orders of the War Department[5] and of the military commands;[6] and, between 1863 and 1865, civilians charged with a violation of one or both of the articles were frequently brought to trial by courts-martial; their sentences, when convicted, being generally approved and executed.[7]

7th. The practice during the war seems to have settled the question in the executive department. In July, 1871, the prevailing construction was recognized and adopted by the Attorney General, who held that certain civilians, apprehended in New Mexico for supplying ammunition to Indians at war with the

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[1] Trial of Arbuthnot and Ambrister, London, 1819; Am. State Papers, Mil. Affairs, vol. 1, pp. 721–734.

[2] Pages 37–40.

[3] Page 147.

[4] DIGEST, 40. And see Ives, 63.

[5] See G. O. 67, War Dept., 1861, in which it is declared that all persons guilty of any unauthorized correspondence or communication by which intelligence may be conveyed to the enemy "will be proceeded against under the 57th (now 46th) Article of war."

[6] In G. O. 24, Dept. of the Ohio, 1863, Gen. Wright, in calling attention specificially to the two articles, enjoins it upon all military officers in the Department "to arrest all persons guilty of their violation, without regard to age, sex or condition, and submit proper charges against such offenders that they may be brought before a court-martial for trial." And see G. O. 80, Div. West Miss., 1864; also Orders cited in next note.

[7] See G. O. 76, 175, 250, 371, War Dept., 1863; Do. 51, Id., 1864; G. C. M. O. 106, 157, Id., 1864; Do. 260, 671, Id., 1865; G. O. 10, Dept. of Washington, 1863; Do. 52, Dept. of the Ohio, 1863; Do. 31, Middle Dept., 1863; Do. 13, Dept. of the Tenn., 1863; Do. 39, 58, Dept. of the Mo., 1863; Do. 190, 203, Id., 1864; Do. 31 Id., 1865; Do. 176, 181, Dept. of the Gulf, 1864; Do. 11, 19, 67, Id., 1865; Do. 78, 88, Div. West. Miss., 1864; Do. 14, 27, Id., 1865; Do. 54, Dept. of the East, 1865.

United States, were amenable to trial under the 56th (now 45th) article, which, he observed, applied to "persons who are not as well as persons who are in the military service."[1] This is the most recent authoritative ruling upon the question of jurisdiction under consideration.

8th. It is, lastly, a just argument in favor of the view that by the term "whosoever" it was intended to embrace non-military persons, that it is not in fact members of the army but civilians—disaffected or mercenary—who would be the most likely to indulge in the practices denounced by these Articles.

Limits of the jurisdiction. Accepting as correct in general the construction which has been put upon the two Articles by the mass of authority cited, it remains to repeat that these are statutes operative only in war, and to remark that the military jurisdiction extended over *civilians* by the same, (as by the other statutes of the general class under consideration,) must be understood to be limited to acts committed on the theatre of war or within the scope of martial law. This point, in substance so ruled by Chief Justice Kent in the early case of Smith *v.* Shaw,[2] has been more recently most clearly held in Jones *v.* Seward,[3] a leading case of a suit instituted against the Secretary of State during the late war. The same principle is in effect asserted by the U S. Supreme Court in *Ex parte* Milligan.[4]

Term of the jurisdiction. It may further be remarked that this special jurisdiction, like that authorized by Art. 63 or any other growing out of a condition of war, should properly be exercised during the continuance of the war status.[5]

The jurisdiction not exclusive. It may be added with reference to this jurisdiction that it is not exclusive. The acts denounced in the Articles are mostly acts of treason, and as such cognizable by the U. S. Courts.[1]

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[1] 13 Opins., 472. What is said under Art. 63, (see *ante*,) as to its applicability to an Indian as well as to a foreign war, is equally apposite here.

[2] 12 Johns., 257, 265. And see *In re* Stacy, 10 Id., 332; Mills *v.* Martin, 19 Id., 22; *In re* Kemp, 16 Wis., 359.

[3] 40 Barb., 563.

[4] 4 Wallace, 121–3.

[5] See DIGEST, 76, 507, and other authorities cited under ART. 63, *ante*.

Sec. 1343, Rev. Sts.—Jurisdiction over Spies. This jurisdiction will be more appropriately considered in Chapter XXV, on the "Articles of War separately considered;" this statute, providing for the trial and punishment of spies, being properly an Article of War.

V. CERTAIN OTHER CIVILIANS MADE AMENABLE BY LAW TO THE MILITARY JURISDICTION.

The Classes of Persons and the Statutes making them Amenable. Besides the classes of civilians last considered, as subjected by statute to the jurisdiction of courts-martial *in time of war*, the existing law makes similarly amenable certain other civilians, generally—*i*: *e*. without regard to the prevalence of a state of war, or equally in peace and war. These latter, who have already been referred to, in this Chapter, under the head of "Exceptions to the General Rule of Non-amenablility after discharge, &c.," are the following:—

(1.) Officers and soldiers retained under military jurisdiction, after discharge, &c., by the last clause of the 60th article of war, providing for the punishment of frauds against the United States, &c.: (2.) Officers accorded a trial by general court-martial, after being summarily dismissed, by Sec. 1230, Rev. Sts.: (3.) Soldiers sentenced to dishonorable discharge and confinement, and, after discharge, held in confinement at the Military Prison at Leavenworth, who are made liable to military trial for offences committed during confinement as being within the terms of Sec. 1361, Rev. Sts.: (4.) Discharged soldiers of the regular army who are inmates of the Soldiers' Home, and as such made subject to the rules and articles of war by Sec. 4824, Rev. Sts.: (5.) Discharged officers and soldiers of volunteers, who, as inmates of the National Home for Disabled Volunteer Soldiers, are made similarly subject by Sec. 4835, Rev. Sts.

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[1] That giving intelligence to the enemy, and supplying the enemy with arms, munitions, provisions or money, are overt acts of *treason* indictable in the U. S. Courts, see Chapter XXV.—FORTY-FIFTH and FORTY-SIXTH ARTICLES, and authorities cited in notes.

General Principle of Non-Amenability of Civilians to the Military Jurisdiction in Time of Peace. All persons of these several classes are *civilians*, by reason of their legal discharge or dismissal from the military service. That a civilian, entitled as he is, by Art. VI of the Amendments to the Constitution, to trial by jury, cannot legally be made liable to the military law and jurisdiction, in time of peace, is a fundamental principle of our public law,[1] and it is quite probable that Congress did not contemplate in these enactments any material departure from this principle. The provision of Art. 60 and that of March 3, 1865, incorporated in Sec. 1230, Rev. Sts., were war measures, intended apparently to be but temporary in their operation, and which have indeed been but rarely availed of in practice.[2] As to Sec. 1361, it may well have been framed without a consideration of the fact that it was expressed in such general terms as to include prisoners who had been discharged as well as those still in the service. Sec. 4824 was probably added simply or mainly *in terrorem:* no court-martial is known to have ever been convened under it.[3] Sec. 4835 is a copy of the last, and as authority for trials by court-martial has proved wholly unavailable.[4]

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[1] See *Ex parte* Milligan, 4 Wallace, 121, 123; Jones *v.* Seward, 40 Barb., 563; *In re* Martin, 45 Id., 145; Smith *v.* Shaw, 12 Johns., 257, 265; *In re* Stacy, 10 Id., 332; Mills *v.* Martin, 19 Id., 22; Johnson *v.* Jones, 44 Ills., 142, 155; Griffin *v.* Wilcox, 21 Ind., 386; *In re* Kemp, 16 Wis., 359; *Ex parte* McRoberts, 16 Iowa, 605; Antrim's Case, 5 Philad., 278; *Ex parte* Merryman, Taney, 246; *Ex parte* Henderson, U. S. Circ. Ct., Dist. of Ky., 1866; Parker *v.* Ld. Clive, 4 Bur., 2419; Looker *v.* Halcomb, 4 Bing., 189; Rawle on Const., 220; 3 Opins. At. Gen., 690; 5 Id., 736; 13 Id., 63; 16 Id,, 13, 48; Maltby, 37; G. C. M. O. 16 of 1871.

[2] See cases under Art. 60 in note, *ante*. As to cases under Sec. 1230, see Chapter VI., where this statute is considered with reference to the authority of the President to convene courts-martial under it.

[3] See, in this connection, the recently published opinion of the Attorney General, in 20 Opins., 514, to the effect that the military authority of arrest, &c., cannot be extended over "non-military persons" at the Soldiers' Home. As a matter of fact *all* the inmates of the Institution are non-military persons, being all honorably discharged soldiers, who had been duly discharged, and had thus become civilians before being admitted to the Home.

[4] A remarkable instance of a futile court ordered under this section, in 1870, and which well illustrates the incongruity of such proceedings, is set forth in DIGEST, 329–30, and referred to *ante*, p. 123, note.

Constitutionality of the Statutes.—These laws, however, remain on the statute book, and under Sec. 1361 discharged soldiers have not unfrequently been brought to trial,[1] while under Art. 60 discharged officers and soldiers are always liable to be tried. It is proper therefore to consider the question of the constitutionality of such laws, and that they are constitutional cannot, in the opinion of the author, be maintained upon sound legal principles. They are certainly not so as being forms of exercise of the power to "govern and regulate the land forces," because the term "land forces" does not embrace discharged officers and soldiers or any other civilians. They must be so therefore under and by virtue of a combination of the *two* powers, to "raise armies" and "govern the land forces." That is to say, they must be regarded as placing or retaining these persons, notwithstanding that they have become civilians, in the army for a temporary or special purpose, and, by the same act, providing for their government while so placed or retained, so that their offences shall be punishable as "*cases arising in the land forces.*"[2] But does the power to "raise armies" extend to the inclusion of such civilians in the land forces? What are "armies" in the sense in which this term is used in the Constitution? Its interpretation is to be found in the series of statutes dating from the period of the adoption of that instrument, and of which the constitutionality has not been questioned, by which the constituents of our armies or Army have been repeatedly defined. These constituents are a certain number of officers commissioned or appointed, and of soldiers enlisted, into the military service as such, bound to obey military orders and to perform military duty in peace or war, entitled to military pay, and remaining under military discipline and government till discharged in due form, or otherwise legally separated from the military state. Such are the "armies" or "land forces" which the Constitution authorizes Congress to raise, support and govern. Can this authority be held to include the raising or constituting, and the governing *nolens volens*, in time of *peace*, as a part of the army, of a class of persons who are under no contract for military service, but on the contrary have been formally discharged from all such contract, who render no military service, perform no military duty, receive no military pay, but are and remain civilians in every sense and for every capacity except the special one for which the statutes under consideration propose to reserve them? Can the authority to govern be extended to the disciplining of soldiers after they have been legally separated from the army? In the opinion of the author, such a range of control is certainly beyond the power of Congress under the provisions of the Constitution referred to. That instrument, in a further provision also,—the Vth Amendment,—clearly distinguishes the military from the civil class as separate communities. It recognizes no third class which is part civil and part military—military for a particular purpose or in a particular situation, and civil for all other purposes and in all other situations—and it cannot be perceived how Congress can create such a class, without a disregard of the letter and spirit of the organic law.

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[1] See p. 123 and note, *ante*.

[2] Compare the ruling in Wildman's Case, DIGEST, 327, note; 16 Opins. At. Gen., 294–5.

In 1866, the Circuit Court of the United States for the District of Kentucky[1] passed upon the constitutionality of the section of the Act of Congress (no longer in force,) of July, 1862, which, in subjecting contractors for supplies for the army and navy to trial by court-martial for certain misconduct,[2] provided in express terms that they should be "deemed and taken to be a part of the land forces or naval forces for which they contracted to furnish the supplies." This statute the court, in an elaborate opinion, pronounced unconstitutional, holding that Congress could not "by its mere declaration" place or include civilians in the army, and that the provision cited was "idle and nugatory;" and it was well observed that if Congress could so dispose of one class of civilians, it could of another, or of all classes, and thus establish a "military despotism."

As to the particular existing statutes under consideration, however, the present weight of authority is in favor of their constitutionality. In the U. S. Circuit Court for the Dist. of California,[3] the concluding clause of Art. 63 has been viewed as constitutional, and a similar view has been taken of Sec. 1361, Rev. Sts., as including prisoners who have been discharged as soldiers, by the U. S. Dist. Court for the Dist. of Kansas[1] and by the Attorney General.[2] Such opinions, whether or not satisfactory to the military student,[3] are to be deferred to till overruled by subsequent or higher authority.[4] The opinion of the author—that this class of statutes, which in terms or inferentially subject persons formerly in the army, but become finally and legally separated from it, to trial by court-martial, are all necessarily and alike unconstitutional—remains unmodified. In his judgment, *a statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace.*

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[1] In the case of *Ex parte* Isham Henderson, on *habeas corpus*. The judgment of the Court of Claims in U. S. *v*. Hill, 9 Ct. Cl., 178, proceeds upon the theory that the enactment of July, 1862, relating to contractors, is a valid provision; but the question of its constitutionality is not at all considered.

[2] Cases of such trials are referred to in note, p. 131, *ante*.

[3] *In re* Bogart, 2 Sawyer, 406.

IV. THE OFFENCES WHICH THE JURISDICTION EMBRACES.

The offences cognizable by general courts-martial are those made so cognizable either by the Articles of war or by other *statutes.*

I. The Offences Cognizable under the Articles of War.

Specific and General Offences. The offences of which mention is made in the code of Articles may be divided—First, into (1) those which are distinguished by specific names and (2) those which are designated under a general description. The former are those made punishable in all the articles which provide for the punishment of offences except the 61st and the 62d: the latter are those included within the general terms of these two articles. But these general terms include more particular forms and phases of misconduct than are contained in all the other articles combined, comprehending as they do all the dishonorable or disgraceful acts compromising their military relations of which officers may be guilty, and all the crimes other than capital, neglects, violations of army regulations and disorders, of whatever nature, not enumerated in the specific articles, which may be committed either by officers or soldiers, and which are directly prejudicial to the order and discipline of the service.

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[1] Wildman's Case, Digest, 327, note.

[2] 16 Opins., 292.

[3] Neither the opinion in Bogart's nor that in Wildman's case is of a positive character. Nor does it seem to be appreciated by the court in either case, or by the Attorney General, that a discharged soldier is fully a civilian, or that a soldier imprisoned under sentence after discharge is simply a civilian convict.

[4] See, now, a recent ruling in the War Department, according with the view expressed by the author, noted in Digest, 327, note.

Two Kinds of Specific Offences. Further, the specific military offences may be divided into (1) those which are purely military and (2) those which are also crimes at the civil law. The former are those designated in all the specific articles except the 58th and 60th; the latter are those enumerated in these two articles.[1] The former are desertion, absence without leave, mutiny, disobedience of orders, disrespectful conduct to a superior, false muster, sleeping on post, drunkenness on duty, cowardice, pillaging, &c.; the latter are the larceny and crimes accompanied with violence recited in Art. 58, and the frauds, embezzlements, &c., described in Art. 60. But in regard to these two forms of offences it is to be observed that all are criminal and all military;—criminal because the jurisdiction of courts-martial is criminal only; military because all offences of officers and soldiers cognizable by courts-martial are necessarily military offences. But though all are both military and criminal, there is the distinction between them that, of the purely military offences the jurisdiction of the court-martial is *exclusive*, while of the others this jurisdiction, except sometimes in war, in a region under martial law or military government,[2] is *concurrent* with that of the civil tribunals.

Further Division of the Specific Offences. Specific offences may also be divided into (1) those which are peculiar to, or made punishable in, a time of war, and (2) those which may be committed and are punishable at any time whether of war or peace. Of the former are those indicated in Arts. 9, 43, 45, 46, 57 and 58, and most of those specified in Art. 42: that described in Art. 44 is also properly a war offence. Of the latter are all the other offences set forth in the code.

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[1] With these two articles, there might, though less obviously, be classed Arts. 26 and 27 which relate to the sending and accepting of challenges, acting as second, &c.,—offences generally punishable by the criminal codes of the States; and Arts. 45 and 46 which relate to the relieving and aiding of the enemy in various forms, some of which certainly, as heretofore remarked, would be indictable as treasons.

[2] See Coleman *v.* Tennessee, 97 U. S., 515, 516.

No Common-law Grades of Offences or Offenders. It is further to be said of the offences which are the subjects of the articles of war that there is no distinction between them of "felony" and "misdemeanor."[1] None of them are felonies and none of them are misdemeanors at military law, but all are simply military crimes.[2] So, among offenders, the Articles recognize no principals, and no accessories either before or after the fact, *as such.*[3] The grades of crimes and of participators in crime, familiar to the common law, are unknown to the law military, and the embarrassing technicalities which have grown out of the division of crimes into principal and accessorial are wholly foreign to the procedure of courts-martial. In the military practice all accused persons are treated as independent offenders. Even though they may be *jointly* charged and tried, as for participation in a mutiny for example, and each may be guilty of a distinct measure of criminality calling for a distinct punishment, yet all are principals in law.

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[1] U. S. *v.* Clark, 31 Fed., 713. The term *felony*, which originally at common law signified a crime entailing a forfeiture of land or goods, is now generally employed in this country to indicate an offence punishable either by death or by imprisonment in a penitentiary. A misdemeanor is "any crime less than a felony." 1 Rus. Cr., 45. The old common law division was into treasons, felonies and misdemeanors. 3 Greenl. Ev. § 1; 1 Bish., C. L. § 608. No sentence of court-martial, though it may include a *quasi* "infamous" punishment, can involve the disability or other penal consequence ordinarily attaching to conviction of felony or other infamous crime.

[2] The offences designated in Art. 58 are indeed, *as civil crimes*, some of them felonies and some of them misdemeanors at common law. But as here made cognizable and punishable by court-martial, *viz.*, "when committed by persons in the military service," they are simply military crimes, and no disability or other penal consequence of a conviction of a *felony* can, in the absence of any statute imposing the same, result from a conviction of any one of them. See DIGEST, 509.

[3] See Kennedy, 188, 190. In the only instance in our code where any apparent allusion is made to the distinction between principal and accessory, occasion is taken to discard it. This is in the 27th article, where it is expressly provided that "all seconds or promoters of duels, and carriers of challenges to fight duels, shall be deemed principals and punished accordingly." In several of the articles, as the 37th, 42d, 43d, 51st and 60th, offences in the nature of those of accessories are made punishable, but always as distinct and independent acts.

No Statutory Grades or Degrees of Offences. Nor are there any *statutory* grades of military offences. There are no grades, for example, of mutiny, desertion, cowardice, or other purely military offence, though the instances of such offences may differ greatly in criminality and may call for very different measures of punishment. So, as to the offences made punishable in time of war by Art. 58—the statutory military law recognizes no such distinction in larceny as *grand* or *petit*, nor any *degrees* in murder, manslaughter, &c., such as are known to the laws of most of the States.[1]

Minor Included Offences. By this term is intended the lesser acts of offence which may be included in the specific offences with which military persons may be charged. The principal of these are absence without leave, manslaughter and larceny, as offences included in desertion, murder and robbery. A further offence of this nature is the "conduct to the prejudice of good order and military discipline" which may be deemed to be involved in every specific military crime. The subject of such inclusion will be further considered in the Chapter on the Finding; it is here adverted to for the reason that the legality of the finding of a lesser offence results from the fact that the court in trying the crime charged, has *jurisdiction* of any minor criminal act recognized as an offence by law, which it contains or involves.[2]

Separate Consideration of Military Offences. The various offences made cognizable by court-martial by the Articles of war will be specifically defined and considered in Chapter XXV, in examining those Articles *seriatim.*

II. OFFENCES COGNIZABLE UNDER OTHER STATUTES.

There remain a few minor statutes not included with the Articles of war, and mostly of a more recent date, by which military persons are made amenable to trial by court-martial for offences additional to those designated in the code. The statutes are:—

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[1] In a few cases the *military commissions* established by the Reconstruction Acts, in deference to the procedure under the State law, found persons charged with Murder guilty of the same in the *second degree.* G. O. 107, 153, Fifth Mil. Dist., 1869; Do. 53, 62, Id., 1870. But they were here acting as *substitutes for the State Courts.* (See PART II.)

Secs. 1359 and 1360, Rev. Sts., by which officers and soldiers are made so amenable for the offences of allowing or aiding convicts to escape or attempt to escape from the Fort Leavenworth Military Prison; Secs. 5306 and 5313, Rev. Sts., in which trading with an enemy without a license, dealing in captured property, &c., with certain other acts of falsity and fraud, are, in cases of military offenders, made cognizable by court-martial—legislation evidently intended to be operative only or mainly in time of war; sec. 4 of the Act of May 11, 1880, by which it is declared that any officer of the army, Indian agent, &c., who, without authority from the President, shall permit any Indian on a reservation to go into the State of Texas, "shall be dismissed from the public service"—in the case of an army officer, it is presumed, upon conviction by court-martial; and sec. 3 of the Act of July 27, 1892, c. 272, by which "fraudulent enlistment" is declared a military offence and made punishable by court-martial. It is only under the first two and the last of these provisions that cases are, in practice, presented for trial.

CHAPTER IX.

THE PROCEDURE OF GENERAL COURTS-MARTIAL.

I. THE ARREST OF THE ACCUSED.

We come now to the extended subject of the Procedure of General Courts; and this subject will be presented in separate Chapters, under the following heads:—I. The Arrest of the Accused; II. The Charge; III. The formal Ordering, Meeting, &c., of the Court; IV. The province and duties of the President and Members; V. The Judge Advocate; VI. Challenges; VII. Organization, Arraignment, &c.; VIII. Pleas and Motions; IX. The Trial; X. The Evidence; XI. The Finding; XII. Sentence and Punishment; XIII. The Record.

THE ARREST.

Before a court-martial is assembled for the trial of an officer or soldier charged with a military offence, the accused is ordinarily and regularly placed in arrest. This personal attachment, or taking of the body into the possession of the law, is, in the military, as in the general criminal procedure, the usual, (though not invariable,) preliminary to a bringing to justice of the offender.[1]

The subject of Arrest is regulated in part by the Articles of war, (Arts 65 to 71 and Art. 24,) the Army Regulations, (Art. LXXIV,) and the Regulations of the Military Academy; and in part by military usage. It will be considered under the three heads of—I. Arrest of Officers; II. Arrest of Cadets; III. Arrest of Enlisted Men.[2]

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[1] Samuel, 639; Clode, 1 M. F., 169; Id., M. L., 10; Manual, 28.

[2] In a strict sense the term *arrest* applies only to officers, the taking into military custody of soldiers being more accurately expressed as

I. ARREST OF OFFICERS.

Occasion and Ground for the Arrest. It is declared by par. 993, Army Regulations, that—"Officers are not to be put in arrest for light offences. For these the censure of the commanding officer will, generally, answer the purposes of discipline." Where, however, the offence is such as to call for trial and punishment, the strict course to be pursued is prescribed in the 65th Article of war, as follows:—"*Officers charged with crime shall be arrested and confined in their barracks, quarters, or tents, and deprived of their swords by the commanding officer.*"

The term "*crime*," as here used, is to be construed not as referring to civil crimes only, but as employed in a general sense and including *all military offences*, whether those purely military, or those which, while cognizable in their civil aspect by the ordinary criminal courts, are also in their military aspect cognizable by court-martial under Arts. 58, 60 and 62.[1] The context of the code from Art. 65 to Art. 71 favors this construction, which is also that sustained by the practice of the service. The corresponding article of the late British code was similarly interpreted by the authorities.[2]

The occasion and authority for the arrest of an officer thus is that he shall be *charged with a material military offence.*[3] By this, however, it is not intended that formal charges shall as yet have been served, or even preferred. It is sufficient that knowledge of the offence be had by the officer making the arrest because of its having been committed in his presence, or, where this is not the case, that an accusation be seriously made, orally or in writing, by a responsible person and communicated to such officer. In most cases indeed—and this is the proper course where practicable—a copy of the charges as preferred is served upon the officer at the time of the arrest. An officer, however, is

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confinement. Manual, 28. Our Art. 70, however, employs the term "arrest" in reference to soldiers as well as officers, and it has been found more convenient to use it in the text as a general rather than a specific description.

[1] See DIGEST, 78. And compare construction of Art. 66, *post.*

[2] Wolton *v.* Gavin, 16 Ad. & El., 66; Simmons § 360.

[3] An officer cannot properly resort to an arrest of another officer in order to anticipate and prevent his own arrest by the latter. See case of Col. J. L. Smith, 3d Infy., in G. O. of Dec. 19, 1820.

not entitled to know forthwith why he is placed in arrest, and, provided the charges are served upon him within eight days, according to the provisions of Art. 71, he can claim no relief on account of the delay.

Form of the Arrest—*The order*. In lieu of the warrant or other process of the general criminal law, a military arrest is, by the usage of the service, regularly imposed by an *order*, and this order may be either verbal or written.[1] An order in writing, as being more formal and better evidencing the action taken, is the preferable mode, and that commonly adopted, except where, the offence being committed in the presence of the commander, the arrest is made by him on the spot. The order of arrest, especially where in writing, is usually given through the adjutant or other staff officer.[2] This official does not ordinarily serve the order by copy, making return upon the original in the manner of a writ,[3] but simply delivers to the accused an original, of which a duplicate is retained or a record made at the headquarters.

There is no prescribed form of expressing the order of arrest. A simple and usual form is a direction to the officer that he "will consider himself in arrest," or "consider himself in arrest and confine himself to his quarters,"[4] till further orders.[5] A requirement that he surrender his sword is sometimes added, but is not essential, the Article itself specifically providing for such surrender.

The confinement. Art. 65 requires that the arrested officer shall be "confined to his quarters," &c., and an officer, upon arrest, will properly betake and confine himself to his quarters without being specifically directed to do so.[1] The quarters of an officer are his military residence, whether consisting of a tent or tents, a barrack, a separate tenement assigned to him at a post, or a house or rooms occupied by him at a station where public quarters are not furnished by the government. The limits of such quarters he cannot, of his own authority, exceed without being guilty of breach of arrest—the offence made punishable by the last clause of the Article.[2] On the other hand, an officer is entitled to be held in arrest at his own military habitation or lodgings, and cannot legally be removed to and confined in a building, tent, &c., remote from his proper quarters.

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[1] That a verbal is equally efficacious with a written order, see Hough, 493; Id., (P.) 22; Griffiths, 24; DeHart, 75; Benét, 47.

[2] "An officer is put in arrest, either directly by the officer who orders it, or, more generally, by the ministration of a staff officer." Simmons § 353; Manual, 28. Simmons adds:—"Arrests have occasionally been imposed by the intervention of the provost marshal, and, more rarely, notified even in public orders."

[3] As is sometimes done in the *militia* service, where the procedure is in all respects more nearly assimilated to that of the State courts. See Maltby, 128.

[4] But that the direction as to *confinement* is not necessary, being included in the simple order of *arrest*, see *post*.

[5] An officer when duly placed in arrest cannot *refuse* to so "consider himself." As remarked by Gorham, (p. 27,) "he is under arrest whether he acknowledges it or not."

The term "confined" does not necessarily import that the officer is to be *detained by force*, or to be harassed or humiliated by any unnecessary restraint. Such a restraint would exceed the requirements of safe custody, and be in the nature of a punishment. Except, therefore, where an attempt to escape or some act of violence is to be apprehended from him, or where he is charged with an exceptionally heinous crime, or an aggravated breach of a previous arrest, he is not in general to be held under guard, and the commander will not properly place a sentinel over his quarters.[3] For an undue or unreasonable exercise of the power of arrest and confinement conferred by the Article, a commander will himself become amenable to charges.[1]

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[1] Unless indeed larger limits are specifically assigned him in the order of arrest. See *post.*

[2] "The article defines precisely what are the limits of an officer in arrest, unless when modified by his commanding officer, and an officer would no more be justified in exceeding them because they are not defined in the order arresting him than he would be in appearing with his sword because it failed to state that he had been deprived of it by his commanding officer." G. O. 42, Dept. of Washington, 1866. (Gen. Augur.)

[3] See Samuel, 642; Simmons § 355; Hough, (P.) 19; 2 McArthur, 3; Delafons, 199, 204; Griffiths, 25; Maltby, 129; Macomb, 20; O'Brien, 154; De Hart, 75. "In the dubious interval between commitment and trial, a prisoner ought in general to be used with the utmost humanity." Adye, 144. The arrest, where the officer properly conducts himself, should not be so severe as to prevent the due preparation of his defence. James, 411. "Where the party may be outrageous, given to drinking, or subject to a temporary derangement of mind, sentries have been placed to prevent the possibility of his going from his confinement." Hough, 492. In the cases of breach of arrest published in the following Orders of the War Dept., the officer was confined under guard to his quarters: G. C. M. O. 441 of 1865; Do. 164 of 1866. The close

The taking of the sword. The theory—it may be noted—of this further feature of a strict arrest under the Article is, that it formally suspends the officer from the functions of his office, and especially from the exercise of command.[2] The sword must of course be surrendered on demand.[3] It is not, however, *essential* to an arrest that it be taken, and this requirement of the Article may be waived; the sword in such case, by a fiction of law, being nevertheless regarded as having actually been surrendered.[4] But that the sword is not in fact taken does not authorize the officer to appear with it during the continuance of the status of arrest.

Extension of Limits of Arrest—*"Close" and "open" arrest.* An arrest imposed according to the terms of Art. 65 is that which is termed "close arrest," or rather the arrest to which an officer is by strict law subjected is necessarily *close* arrest, unless expressly modified by the commander. The Article, in-

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arrest of an officer should not be characterized by an undue *publicity*, as tending unnecessarily to impair the respect in which he should be held by his inferiors. Hough, 461, note.

[1] Samuel, 642; G. O. 59, Dept. of the South, 1862; Do. 251, War Dept., 1863. As to his liability also to a civil suit for damages, see PART III.

[2] O'Brien, 154; Harwood, 35. In the early cases of Gen. Hull, (1813,) and Gen. Gaines, (1816,) these officers are described in the records of trial as depositing their swords with the President of the Court before being arraigned. The Order, (of Nov. 11, 1816,) which promulgates the proceedings in the case of the latter, (who was acquitted,) directs:—"The President of the Court will restore the sword of Maj. Gen. Gaines, with a copy of these Orders." In a case of an officer sentenced to be suspended, it was ordered by the reviewing authority, in approving the sentence, that—"his sword will not be returned to him until after the expiration of the term of suspension." G. O. 61, Dept. of the East, 1865.

[3] In a case in G. O. 310 of 1863, an officer is convicted of "conduct unbecoming an officer and a gentleman" in first refusing, when placed in arrest, to surrender his sword, and then endeavoring to break it before delivering it up. At the "Simla court-martial," Capt. Jervis was convicted upon a charge of refusing to give up his sword on arrest. Simmons § 353, note.

[4] See Tytler, 203; Hough, 460, 493; Griffiths, 24; Macomb, 19; Maltby, 129; O'Brien, 154; De Hart, 75.

deed, in declaring that the arrested officer "*shall* be confined," &c., might perhaps be regarded as a mandatory statute, absolutely requiring a close arrest by confinement in all cases. No penalty, however, is prescribed for not complying with its injunction, and that the provision is to be viewed as directory only upon the commander, who may thus, in proper cases, at his discretion, make exceptions to the general rule, is indicated by the fact that, *pari passu* with the Article, has long existed and been in force the army regulation—now par. 992, A. R.[1]—to the following effect: "An officer in arrest may, at the discretion of his commanding officer, and upon written application, have larger limits assigned him than his tent or quarters. Close confinement will not be enforced except in cases of a serious nature."

The result, in practice, is that in the great majority of cases, (especially where the detention is likely to be of considerable duration,) larger limits than the quarters of the officer are granted when asked; the arrest being in this manner reduced from a "close" to an "open" one, or an arrest "at large."[2] In many cases, indeed, more extended limits than those specified in the Article are allowed in the first instance and without being applied for, such limits being designated in the original order of arrest. Which of the two kinds of arrest shall be imposed or continued rests wholly in the discretion of the commander. This discretion will be guided by a consideration not only of the nature of the offence and the conduct of the accused prior to and at or after the arrest, but of his state of health, the facilities required to enable him to confer with his counsel and prepare for his defence, the commodiousness or the reverse of his quarters, the season, climate, &c.;—the certificate of the medical officer, when the accused is ill, as to his physical or mental condition, the space properly required by him for air, exercise, &c., being of course always deferred to.[3]

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[1] The substance of this paragraph first appears in the Regulations of 1821. That the arrest, in the British military law, may be close or open at the discretion of the commander, is noticed in Hannaford *v.* Hunn, 2 C. & P., 158.

[2] As to the distinction between close and open arrest, see Tytler, 202; Hough, 494; Id., (P.) 21; Simmons § 354; Clode, M. L., 113; De Hart, 75; DIGEST, 119–120. That an open arrest, where the limits prescribed were "the City of Washington," did not impose a *physical restraint* entitling the officer to resort to a writ of *habeas corpus* for his release, see Wales *v.* Whitney, 114 U. S., 564.

[3] See Tytler, 203; Hough, 460, 492, 493; Id., (P.) 19, 22; Clode, M. L., 113; Id., 1 M. F., 169, 171.

The limits usually prescribed or acceded, where a close arrest is not imposed or continued, are commonly the boundaries of the camp, post, or station, or of a certain circuit of the neighborhood of the officer's quarters. At a post upon a military reservation, the range of the reservation, if not too extended, would in a proper case be accorded.[1] The limits once fixed may even be enlarged upon a second application. As to the number of applications there is no restriction: larger limits may first be refused on account of misconduct of the officer, and granted after his behavior has improved. In some cases the scope allowed, in view of the rank of the party, the nature of the offence, &c., is so wide and general that the arrest becomes little more than a mere form.[2]

Analogy of enlargement on bail. A theory which has been advanced to explain the practice of thus permitting an arrested officer to be at large is that the possession by him of a *commission*, which would be in danger of being forfeited if he violated his parole and escaped, is a sufficient *security*, answering to *bail* at the criminal law, for his not withdrawing himself from military custody, and for his appearance before the court for trial at the appointed time. In the words employed by Clode, "the officer gives bail in the value of his commission."[3]

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[1] Griffiths, 24; Benét, 46–7; DIGEST, 170. And see G. C. M. O. 51 of 1867; G. O. 42, Dept. of Washington, 1866. In a case of breach of arrest in G. C. M. O. 37, Dept. of Texas, 1874, the order enlarging the limits of the original arrest, as set forth in the specifications, is as follows: "The limits of the arrest are so far extended as to allow him to leave his quarters at any time between reveille and retreat for the purpose of exercise, with permission to go beyond the limits of the garrison. He is not authorized by this order to enter any house." [The offence consisted in entering houses in an adjoining village without authority.]

In the British navy, the officer "is generally allowed to walk about the ship at large, (the quarter deck excepted,) without a sword." Delafons, 199. And see Hickman, 162. As to the practice in our navy, see Harwood, 36.

[2] As in the case of Medical Director Wales of the Navy, (Wales *v.* Whitney, 114 U. S., 564,) noticed in note on p. 156, *ante.*

[3] M. L., 113. And see Id., 1 M. F., 171. "It is an old and very good military maxim that an officer's commission is a good security against his breaking his arrest." Hough, (P.) 19. And see Adye, 144; Delafons, 199; Kennedy, 15; O'Brien, 153. "This affords one great reason for the distinction taken between a commissioned officer and soldier, in the circumstances of the arrest. * * * In all cases

Deferring of Arrest till Trial. The arrest of officers is so much a matter of discretion that cases are recognized in which arrest is not required to be imposed until just before trial. Par. 994 of the Army Regulations prescribes that—"A *medical officer* charged with the commission of an offence need not be placed in arrest until the court-martial for his trial convenes, if the service would be inconvenienced thereby, unless the charge is of a flagrant character." Other instances also may arise where, because the officer is engaged upon some highly important service, or for other controlling reason, it may not be desirable to order him in arrest till the eve of trial.

Omission to Arrest. In some cases it has been omitted altogether to place the officer in arrest either prior to or pending the trial. These were mostly cases of officers of the higher grades, in which a trial was desired by the accused, and it was known that he would voluntarily appear before the court. The mere fact that the accused has not been subjected to arrest can in no case affect the jurisdiction of the court or the validity of its proceedings or sentence. If the accused of his own accord appears and submits himself to trial, the court is authorized to proceed in the case equally as if he had been brought before it compulsorily and in arrest. On the other hand an officer cannot refuse to appear for trial on the ground that he has not been put in arrest, or plead the omission in bar of trial.[1] An officer is not entitled to demand to be arrested prior to trial, and he must obey an order to present himself for trial with the same promptitude whether or not he may have been formally arrested.[2] It is proper to add that an omission to arrest is an *irregularity* which must

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where the alleged crime, if proven, could not endanger more than an officer's commission, it may be said that this is a sufficient guarantee for the appearance of the accused, and that no other precautionary measure for that purpose would appear demandable." But in more aggravated cases, "additional securities should and ought to be taken." Samuel, 614.

[1] See the case of a conviction of a superior officer, for a violation of this regulation, in G. O. 59, Dept. of the South, 1862, and Do., 251, War Dept., 1863. In an old Order, (A. & I. G. O.,) of Sept. 22, 1819, the conduct of a post commander, in placing the post surgeon in arrest under a sentinel, is disapproved as "contrary to the usages of the service and unjustifiable."

[2] DIGEST, 170.

in general be prejudicial to discipline and the due administration of justice.

By whom Arrest is to be Imposed. Art. 65 indicates the "commanding officer" as the agent of arrest,[1] and par. 990 of the Army Regulations declares:—"Commanding officers alone have power to place officers under arrest, except as provided in the 24th Article of war."

By the term "commanding officer," as applied to the *line* of the army, is meant the chief of the complete integral command or separate organization to which the officer is attached or with which he is serving—as the regiment, detached company, detachment made up from various companies or corps, garrison, post, &c. Thus a captain commanding a company would not properly place in arrest a lieutenant of his company, if the company was serving with and as a part of a regimental or post command, of which a superior to the captain was the commanding officer present: otherwise, if the company was quite severed and acting alone. As applied to the *staff*, the "commanding officer," in the sense of the Article, of an officer of the general staff would ordinarily be either the chief of the staff corps of which he was a member, or department commander at whose headquarters or under whose immediate command he was serving;[2] or, if his station of duty were a separate post, the officer, superior in rank to himself, in command of the post, provided he were at the time under the orders of such post commander.[3]

Of course, here as in the other military relations, the "commanding officer" is not merely the immediate commander but also any superior of the latter who also commands him. Thus a department commander may place in arrest an inferior officer attached to a post command within his department. So the

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[1] "The custody of the prisoner's person belongs to the commanding officer as a part of his command." De Hart, 81. "The commanding officer is the person vested with the authority of placing an officer in arrest, or soldier in confinement, and this for wise purposes; for, if any officer under his command could at pleasure, upon any fancied insult or supposed grievance, deprive another of his liberty, a regiment would exhibit a scene of disorder, anarchy, and a total absence of all discipline." Hough, 459.

[2] In the case of an aid-de-camp, the commanding officer would be the general to whose personal staff he belonged or was attached.

[3] See G. O. 395 of 1863, in regard to the arrest of paymasters.

President may order the arrest of any officer of the army, and the general-in-chief the arrest of any officer under himself. In practice, the arrest of an officer proposed to be tried is not unfrequently originally ordered by the authority by whom the court has been or is to be convened. In some cases the arrest *must* be ordered by a superior to the officer who, as commanding officer, would otherwise be the proper person to order it. Thus a post commander could scarcely properly place in arrest an officer of his command who had been detailed and was acting upon a court-martial assembled at the post by the department commander, but the latter would be the proper authority for the purpose.[1]

Excepted cases—Arrest by others than the commanding or superior officer. The exceptions referred to in par. 990, Army Regulations, (above cited,) as authorized by Art. 24, are those of "quarrels, frays, and disorders," on the occasion of which any inferior officer or non-commissioned officer of the army is empowered to place in arrest the participants though they be of superior rank. Thus a sergeant or corporal, in exerting himself to quell an affray or riot, would be authorized to arrest a commissioned officer engaged in it, and a lieutenant would be authorized to arrest a captain, or field officer, &c.[2] There is nothing in this power to excite apprehension; the inferior, in employing it, simply exercises an authority, analogous to that with which every citizen is invested, to put a stop to a breach of the peace and arrest an affrayer;[3] and a military superior, arrested by an inferior under the circumstances, instead of protesting, would in general rather have occasion to congratulate himself that he has been taken in hand by one of his own class rather than by a strange policeman or other civilian. Cases of such arrests, however, must be of the rarest occurrence.

A further rare *exception* to the general rule is recognized in a case where a junior may be authorized to arrest a senior on account of some gross misconduct or criminal incapacity by which military authority and discipline are paralyzed, and where the *necessity* of the moment justifies the junior in assuming to supersede his superior in the command. The leading case of this class is that of Lieut. Col. Hog of the British army, who was convicted of drunkenness on duty on an inspection parade and cashiered. The court, in imposing sentence, remarked as follows:—"The court conceives that it would be dereliction of duty were it to pass unnoticed so extraordinary and, as far as the experience of the court extends, unprecedented an occurrence as that of a commanding officer being put in arrest, while in the actual command of a regimental parade, by a junior officer of the corps." Upon this observation the comment of the reviewing authority, the Commander-in-chief, was as follows:—"The court are in error when they suppose that circumstances may not occur, even upon a parade, to justify a junior officer in taking upon himself the strong responsibility of placing his commander in arrest: such a measure must alone rest upon the responsibility of the officer who adopts it, and there are cases wherein the discipline and welfare of the service require that it should be assumed."[1] This ruling has been recognized as law by the later authorities.[2]

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[1] Hough, (P.) 711.

[2] See O'Brien, 106; De Hart, 76. That such was the construction of the similar British article, see Samuel, 400; Hough, 203.

[3] See Burdett *v.* Abbott, 4 Taunt., 449, and the other authorities cited on this subject in the author's note to DIGEST, 32; also *post*, Chapter XXV—"TWENTY-FOURTH ARTICLE."

Status of Arrest. An arrest once duly imposed detaches the officer from the functions of his office: he may not assume to command or to perform any military duty. At the same time a certain line of conduct becomes obligatory upon him. If closely confined, he cannot leave his quarters: if he does so, he will render himself amenable to trial and to a sentence of dismissal for the offence of breach of arrest, hereafter to be considered If his arrest is an "open" one—the privilege of extended limits having been accorded him—he is considered as at large upon his parole of honor, and, if he exceeds the limits assigned, is liable to trial for a violation of the 62d article of war. He should also be especially circumspect in conforming to regulations and orders so far as they apply to him; the fact that he is no longer a free agent not entitling him to consider himself irresponsible.[3]

There are also certain acts which, though not necessarily subjecting an arrested officer to charges, are considered inappropriate and indecorous, and, if aggravated or persisted in, may furnish ground for further proceedings. Thus par. 995 of our Army Regulations declares:—"An officer under arrest will not * * * visit officially his commanding or other superior officer unless directed to do so. His applications and requests of every nature will be made in writing."[1] The Queen's Regulations prescribe:—"An officer in open arrest is on no account to appear in his own or any other mess premises, or in any place of amusement or public resort, and he is not on any pretext whatever to appear within the precincts of the station or garrison dressed otherwise than in uniform. An officer, when in arrest, will not wear sash, sword, or belts with his uniform."[2] These rules are in general equally appropriate to our service.

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[1] James, 840, 841.

[2] Hough, 296; Simmons § 357; Gorham, 27; Manual, 29.

[3] See Hough, 491.

On the other hand, it devolves upon the commander to treat in a similarly formal and ceremonious manner an officer whom he has placed in arrest; all orders or communications made to him being properly transmitted in writing and through a staff officer.

The status of arrest affects in no manner the right of the officer to the pay and allowances of his rank.[3] Unless in arrears to the United States, or held as a deserter,[4] he is entitled to be paid precisely as if he had not been arrested. So, as it has been held by the Judge Advocate General, an officer in arrest is not disqualified to prefer charges.[5] But an arrested officer could not properly be allowed a leave of absence, except in some extreme case, as where considerations of humanity or justice require the granting of the indulgence, and in such a case the arrest would properly be temporarily suspended.

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[1] Par. 1000 assigns a place for arrested officers when the regiment or company is "on the march."

[2] Sec. 6, § 20. And see, as especially full on this subject, Hough, 491. The same author, (p, 494,) cites a case where certain subalterns were censured for persisting in associating in a marked manner with an officer while in arrest.

[3] See Circ. No. 14, (H. A.,) 1890.

[4] Par 1413, A. R.

[5] DIGEST, 171. It has been held that an officer, though under arrest, was empowered to exercise the authority to quell frays and disorders devolved by Art. 24. G. O. 92, Dept. of the South, 1872. But he could hardly "order officers into arrest," &c.

Term and Discontinuance of Arrest—***Discretion of commander.*** Subject to the provisions of Arts. 70 and 71 yet to be considered, the matter of the release of an officer from arrest is, in general, quite within the discretion of the commander by whom the arrest was ordered.[1] An arrest being imposed with a view to trial is in general not discontinued till the trial has been completed and the judgment of the court finally acted upon. The original commander, however, if the case has not passed beyond his control, may, under exceptional circumstances, if he deems it just and proper to do so, release the officer from arrest without regard to the pending proceedings. But where the case has been formally submitted to the action of higher authority, as where a court-martial for the trial of the arrested officer has been convened by a superior of the original commander, the latter would not be empowered, except by the direction of the superior, to terminate the arrest.[2]

Absence of authority in the court. A court-martial can no more release from arrest than it can arrest an officer.[3] Even its acquittal does not enlarge the accused: it still remains for the proper commander to discharge him from the arrest as such, in and by the written order promulgating the proceedings or otherwise.

Absence of authority in the officer—His duty. Nor can the officer under any circumstances release himself from arrest. Moreover, when the authorized commander has released him, he cannot refuse to be released. The discharge from arrest is an *order* which, like any other military order emanating from a competent source, must be obeyed by its subject. The commander alone having authority in the matter, the officer is bound to accept his release as determining his status in regard to the case, and to resume the functions of his office. Even after charges have been duly preferred and served, he cannot, on being discharged from arrest and ordered to return to duty, persist in considering himself in arrest or entitled to a trial. The fact of arrest with charges gives him no right to demand a court; the granting of a trial in his case being a matter within the sole discretion of the department commander or other superior authorized to order one.[1]

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[1] Samuel, 640; Kennedy, 15; Simmons § 368.

[2] "The authority competent to direct the release of an officer must be the officer who imposed the arrest, or the superior to whom it may have been reported." Simmons § 368. And see Manual, 20. Our corresponding article of 1786 and 1806, contained, after the words "by his commanding officer," in the last line, the words, (now omitted,) "or by a superior officer."

[3] So, having legally nothing whatever to do with the matter of arrest, a court-martial cannot, with a view to facilitate the defence of an officer, properly interfere with the continuance of a close arrest, nor, in its judgment, unfavorably criticise the action of the commander in imposing or continuing such an arrest. Hough, 461· Id. (P.) 20; Griffiths, 25.

Constructive Release from Arrest. There are certain proceedings which, either in law or by the custom of the service, have been regarded as practically releasing an officer from arrest, because operating to discontinue the status of arrest. Thus it was held by Atty. Gen. Cushing[2] that the *promotion* of an officer, while he is in arrest, will have such effect: this because the promotion is a constructive pardon, and, the charge being removed, the arrest falls with it. So, putting an arrested officer on duty, or allowing him to do duty at his own request—as to go into an engagement with his regiment—will discontinue the arrest.[3] But here there is no pardon of the offender, nor can the action taken be pleaded in bar, or serve as a defence, upon a trial subsequently ordered: in such case the right to arrest is not divested by the action taken, but suspended only, and the officer, after the duty has been performed, may be re-arrested and arraigned.[4]

Limitation of period of arrest of Officers, by Arts. 70 and 71. Art. 70, which will be more fully considered in treating of arrests of *soldiers*, directs that:—"*No officer or soldier put*

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[1] Upon the subject of this paragraph, see Samuel, 639; Hough, 465, 494; Id. (P.) 21; Simmons § 368; Kennedy, 15; O'Brien, 155; De Hart, 76; Manual, 29, (citing Queen's Regs., Sec. VI, § 23.) As to the distinction in this respect between the military and the civil procedure, see In matter of Martin, 45 Barb., 144.

[2] 8 Opins., 237.

[3] DIGEST, p. 170. But ordering or permitting the officer to appear as a witness before a court-martial will not properly have such effect. Harcourt, 119.

[4] The removal of an arrested officer to a new station does not *per se* suspend the arrest. See Cox *v.* Gee, Winst. L. & E., 134.

in arrest shall be continued in confinement more than eight days, or until such time as a court-martial can be assembled."

From the use of the word "confinement" it is to be inferred that, as to *officers*, this Article applies only to those who are in close arrest, *i. e.* those arrested and held strictly as contemplated by Art. 65.

In the original article, as it appeared in the codes of 1775 and 1776, the word "conveniently" preceded and qualified the word "assembled." In view of its omission in the subsequent forms, the term "can be assembled" must, it is believed, be held to mean can *practicably* or reasonably be assembled, *i. e.* as soon as the exigencies of the service may permit.[1]

The effect of the Article, as to officers, thus is, that officers in close arrest may not be retained in such arrest for a longer period than eight days, unless a court-martial cannot with reasonable diligence be assembled within that time. How much longer they may be held if a court cannot thus be convened is left indefinite.

But here intervenes Art. 71, which provides, (among other things,) that, "*except at remote military posts or stations,*" (*i. e.* those on the frontier, or which are distant because of the absence of facilities of communication therewith,[2]) officers of the army shall not be held in arrest for a longer period than forty days. Construing this article with the former, the result is that, as to the excepted cases, Art. 70 is left to apply without qualification, while, as to other cases, it cannot be held to authorize, under any circumstances, a confinement before trial longer than forty days.

Special Provisions of Art. 71. This Article is in full as follows:—"*When an officer is put in arrest for the purpose of trial, except at remote military posts or stations, the officer by whose order he is arrested shall see that a copy of the charges on which he is to be tried is served upon him within eight days after his arrest,*[3] *and that he is brought to trial within ten days thereafter, unless the necessities of the service prevent such trial; and then he shall be brought to trial within thirty days after the expiration of*

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[1] Compare the construction of a similar provision by Atty. Gen. Wirt in 1 Opins., 300.

[2] See Waters *v.* Campbell, 5 Sawyer, 20.

[3] See the ruling of the Supreme Court in construing Art. 43 of the naval code, in the recent case of Johnson *v.* Sayre, 158 U. S., 109.

said ten days. If a copy of the charges be not served, or the arrested officer be not brought to trial, as herein required, the arrest shall cease. But officers released from arrest, under the provisions of this article, may be tried, whenever the exigencies of the service shall permit, within twelve months after such release from arrest."

This provision, which was originally enacted as s. 11, c. 200, Act of July 17, 1862, and first appears as an article of war in the revised code of 1874, is comprehensive in its terms and applies to all arrested officers, whatever the form of the arrest, whether "close" or "open." Its evident policy was to preclude protracted arrests and secure prompt trials. It may be said of it, as was remarked by Atty. Gen. Cushing[1] of an article of the naval code, (the present 45th,) that it is enacted in the spirit of the provision of the VIth amendment to the Constitution, that "in all criminal trials the accused shall enjoy the right to a speedy trial."[2]

Except as to the occasions expressly excepted of cases occurring "at remote military posts or stations," which are left to be governed by the provision of Art. 70 just considered, the present Article is absolute and mandatory. The term of the officer's arrest,—instead of remaining dependent upon the uncertainties attending the assembling of the officers necessary and proper to compose the court, the collecting of the witnesses at the place of trial, the movements of the army in war, or other incidents of the service,—is limited by the Article absolutely and under all circumstances to certain periods. If charges are not served upon him within eight days after the arrest, "*the arrest shall cease.*" If, having been duly served with charges, he is not brought to trial within ten days after the arrest, or—where the exigencies of the service prevent a trial by that time—within forty days at the longest, "*the arrest shall cease.*"

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[1] 6 Opins., 207.

[2] The occasion of the enactment of this Article is understood to have been the protracted arrest and confinement at Fort Lafayette of Brig. Gen. Chas. P. Stone, U. S. Vols., who had been so held without trial for about one hundred and fifty days, when Congress, having become advised of the facts, inserted this provision for his benefit in an Act relating to the army. After its passage he was held thirty days longer, (the limit allowed by the statute,) and then released after a confinement of one hundred and eighty-eight days in all. Blaine's Twenty Years of Congress, vol. 1, p. 390.

An enactment thus mandatory and explicit in the conferring of individual rights cannot be disregarded or evaded by a commanding officer.[1] But while, in view of the positive language employed, the officer becomes entitled to an immediate release from arrest, upon failure to serve charges or bring to trial as provided, and *is* released *in law*,[2] yet, if not released *in fact*, he cannot, from military considerations, be permitted to release himself. In deference to the principle of subordination which is the foundation of the military system, he must, if not discharged at the proper time, (as he should be,) duly make application to be released to the commander by whom the arrest was ordered. If the application is disregarded, he may seek redress under the 29th Article, if his case falls within its provisions;—or, if not, may appeal for relief to superior authority.[3] He has the right of course to prefer charges against the commander for a failure to observe the injunctions of the statute.

While the fact of a prolonged arrest in contravention of the terms of the Article could not be pleaded in bar of trial when the officer came to be arraigned, this fact, in the event of a conviction, would properly go to induce a mitigation of the punishment, or would furnish good ground for a remission, in whole or in part, of the sentence by the reviewing authority.[4]

The effect of the concluding provision of this Article, considered in connection with Art. 103, will be remarked upon in Chapter XVI.

Breach of Arrest. Art. 65, which provides, as we have seen, for the close arrest of officers by confinement in quarters, declares further:—"*And any officer who leaves his confinement before he is set at liberty by his commanding officer, shall be dismissed from the service.*"

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[1] "It would manifestly be an evasion of the Act if a (commanding) officer were to be permitted to keep an officer in arrest by *renewing* his arrest as often as it expired by legal limitation. The evil and injustice which this Act was designed to prevent would be equally as well accomplished by repeated arrests of eight days each as by one continued arrest." G. O. 86, Dept. of Va., 1865. (Gen. Terry.)

[2] See G. O. 86, Dept. of Va., 1865.

[3] DIGEST, 80.

[4] See G. O. 44, Fifth Mil. Dist., 1868.

The offence thus visited with an extreme punishment[1] is that which is known in military parlance as *breach of arrest.* It is here restricted to the single act of the quitting of close confinement by the officer before he is duly liberated therefrom. The term "breach of arrest," however, is not exact or technical, and is sometimes carelessly employed in describing offences not within the purview of this, but cognizable only under the general 62d article.[2]

The leaving of the confinement. The "confinement" intended is clearly that designated in the first clause, viz. a confinement in "barracks, quarters, or tent." To constitute therefore a violation of the Article, the officer must (as shown by the written order of arrest, or testimony of adjutant, &c.[3]) have been duly confined in and to his proper quarters, (as heretofore defined,) and must have quitted the same before being permitted to do so by the proper commander.[4] The distance which he may thus go is not material, nor is the period of time during which he may be absent.[5] If he leaves, (except from necessity,[6]) the place to which he is restricted, merely to proceed to some other part of the same garrison, he is equally chargeable with a breach of the Article as if he had separated himself by a long distance or time from the post or station. In the cases, published in the General Orders, of officers properly charged with, and convicted of, this offence, the same is alleged to have variously consisted—in visiting without permission the quarters of the commanding officer,[1] or those of another officer,[2] at the same post; in going to the guard-house or visiting the guard;[3] going to the sutler's or post trader's store;[4] attending as a spectator a trial by court-martial;[5] similarly attending a parade of the battalion;[6] riding or walking outside the camp;[7] visiting a place of entertainment near the camp;[8] going outside the post into the neighboring town[9] and appearing in public places;[10] crossing the Navy Yard Bridge from the District of Columbia and entering Maryland;[11] going to a public race-course and remaining two days absent;[12] going from Portland, Me., to Boston, and not returning till the fourth day,[13] &c.

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[1] It was once punished with death in the British law. Samuel, 644. As to its gravity, see remarks of Gen. Augur in G. C. M. O. 37, Dept. of Texas, 1874.

[2] As to disorders, or acts of disobedience or neglect, by officers, improperly charged under this designation, see *post.* The most frequent misuse of the term, however, is in describing violations of arrest by non-commissioned officers and soldiers. See G. O. 19, Dept. of the Cumberland, 1867.

[3] Hough, 494.

[4] The quitting must be of *quarters.* The conviction in the case in G. C. M. O. 93 of 1865, where the officer was charged with "breach of arrest" in escaping from a *military prison,* (to which he had been committed for the killing of a sutler,) was properly sustainable only on the ground that the pleading amounted to an allegation of an offence under Art. 62.

[5] "Officers under close arrest ought to be extremely cautious not to quit their quarters; * * * for to whatever trifling distance they may have gone, or for whatever short time they may have been absent, a general court-martial would be obliged to find them guilty of breaking their arrest." Kennedy, 15. "It is sufficient to prove in the case of a close arrest, that A. B. left his confinement; it matters not where he went to." Hough, 494. In G. C. M. O. 1, Dept. of Ky., 1865, is a case of an officer charged with breach of arrest in "leaving his stateroom on a transport and going to the forepart of the cabin."

[6] The order of arrest sometimes expressly provides for cases of necessity. Note instances in G. C. M. O. 16, Dept. of the Miss., 1865; Do. 18, War Dept., 1867.

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[1] G. O. 380 of 1863; G. C. M. O. 441, Id. of 1865; G. O. 111, Dept. of Washington, 1864.

[2] G. C. M. O. 18 of 1867; Do. 29 of 1881.

[3] G. C. M. O. 164 of 1866; Do. 57 of 1867.

[4] G. C. M. O. 220 of 1866; Do. 29 of 1881; Do. 16 of 1888.

[5] See in Hough, (P.) 77, a case of an officer who, having been placed in arrest while a member of a general court-martial, "went in person to make the circumstance known to the court," thus breaking his arrest.

[6] G. O. 26, 1851; Do. 11, Army of the Potomac, 1861. In Do. 29, Dept. of New Mexico, 1864, is a case of an alleged breach of arrest in leaving quarters and "loitering about the post."

[7] G. C. M. O. 44, Army of the Potomac, 1864.

[8] G. C. M. O. 93 of 1875. And see Do. 115 of 1866.

[9] G. C. M. O. 53 of 1890, where the breach of arrest of the officer consisted in his going to a neighboring town and thence to a ranch, seventeen miles from the post, and remaining there till apprehended.

[10] G. C. M. O. 16, Dept. of Miss., 1865; Do. 42, Dept. of Washington, 1866.

[11] G. O. 111, Dept. of Washington, 1864. And see a similar case in G. O. 84 of 1863.

[12] G. O. 62, Dept. of the Gulf, 1864.

[13] G. O. 43, Dept. of the East, 1864. In a case in G. C. M. O. 38 of 1867, the officer, in breaking his arrest, left the post and was absent 22 days,—for which he was, also, charged with desertion and convicted of absence without leave.

The animus of the offender. It is to be remarked that the mere act of quitting the quarters, &c., without the proper authority, consummates the offence, whatever the intention or motive. Breach of arrest indeed ordinarily involves, with a disobedience of orders, a deliberate defiance or contempt of authority,[1] and hence the heinousness usually ascribed to it;[2] but an evil *animus* is not essential to constitute it, and an officer leaving his close arrest under the *bona fide* impression that he was authorized to do so, when in fact no such authority existed, would, strictly, be guilty of a violation of the Article.[3]

Defences. The nature of the offence is further indicated by the defences which have been set up to the charge. Thus it is no defence that the officer was *innocent* of the offence for which he was arrested and confined and that the arrest was therefore unwarranted.[4] The question of the guilt of the accused upon the original charge cannot be tried in this proceeding, and evidence offered to show that he was not guilty will be irrelevant and inadmissible. Even if innocent in fact, his arrest would not necessarily be illegal; the commander being, in his discretion, authorized to arrest upon reasonable grounds of suspicion. Nor is it any justification for a breach of arrest that the quarters of the officer were in bad repair or otherwise unsuitable as a domicile;[5] or that the arrest, by reason of the unnecessary placing of a guard over the quarters, or otherwise, was unjustifiably severe;[1] in such cases the officer's proper course is to apply for relief to the commander, or, if he refuses it, to the proper superior. But that the arrest was ordered by an officer without authority to impose it, would be a complete defence: what officers have authority to institute arrests has been heretofore considered. It is also a complete defence that, subsequently to his original confinement, the accused has been put on duty or allowed to do duty,[2] provided that, before the breach assigned, he had not been duly re-arrested and re-confined.

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[1] As indicated sometimes, not only by protracted absence on the part of the officer, but by such acts as resuming his sword or the exercise of his official functions, (See case in G. C. M. O. 57 of 1867;) disorderly conduct or insolence toward the commanding officer, (G. C. M. O. 441 of 1865;) refusing to return to his quarters, and only doing so when compelled by force, (G. C. M. O. 3, Div, of the S. West, 1865;) forcing a sentinel placed over his quarters, (G. C. M. O. 164 of 1866.)

[2] See O'Brien, 154; DeHart, 80.

[3] In cases where it appears that the accused has acted in good faith, in ignorance, or under a misapprehension of his strict military obligation, the court has not unfrequently recommended and the reviewing authority granted a remission or commutation of the sentence. As in an early case in G. O. 27 of 1835, where the breach consisted in going to the mess-house. And see a similar case in G. C. M. O. 18 of 1867, where it consisted in going to the sutler's store.

[4] "It does not signify whether he was placed in arrest with or without cause." Hough, 494.

[5] G. O. of Oct. 31, 1809.

Acts not constituting the specific offence. The character of the offence is also illustrated by distinguishing it from certain acts sometimes charged under Art. 65, but which are properly acts in disobedience of orders or merely acts prejudicial to good order and military discipline. Thus a non-compliance with an order of arrest, in refusing to be arrested or confined, or of an order requiring the officer to report in arrest to a certain commander, however grave a dereliction, does not constitute the offence under consideration. Nor does a transcending of limits, after larger limits than those of the original close arrest contemplated by the Article have been allowed the officer, constitute the offence, though it may indeed involve a still higher criminality.[3] So, for an arrested officer to quit his company or regiment, when personally with it in the field or on the march, is an offence quite other than a violation of this Article.

Further, the specific offence being restricted to the single act indicated, no infraction or non-observance of any condition or obligation incident to the status of arrest *other* than that to remain confined till liberated, will of itself amount to such offence. Thus the wearing of his sword by an officer while confined in arrest, is not, *per se*, a technical breach of arrest, nor is the issuing of an order or other assumption of official authority.[1] Nor, again, will drunkenness, disorderly conduct, or other improper or criminal act of which an officer, while remaining strictly within his confinement, may be guilty, however grossly the same may offend against good order and military discipline, amount to the particular delinquency under consideration.

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[1] G. O. of Sept. 22, 1819.

[2] See Hough, (P.) 19.

[3] In G. C. M. O. 37, Dept. of Texas, 1874, Gen. Augur, in referring to cases of transgressing *extended* limits of arrest, as not "technically fulfilling the requirements of" the Article, adds that the same "nevertheless involve as much if not more moral turpitude in their commission, inasmuch as the greater the liberty accorded to an officer, and the confidence reposed in him, the greater are his obligations not to abuse that confidence."

The setting at liberty. This proceeding of the commanding officer, which alone will discontinue the close arrest, may be resorted to presently upon the arrest, and either by the commander of his own motion or in compliance with an application by the accused, or may be delayed till the trial has been completed and the judgment finally acted upon.[2] But where indeed the *limits* of the strict arrest have been *extended* by the commander, as where the officer, confined upon arrest to his quarters, has been allowed the range of the post or station, he is, so far as concerns the application of the Article, as effectually "set at liberty" as if the status of arrest had been discontinued altogether.

II. ARREST OF CADETS.

In the main the principles applicable to the arrest of officers will apply to the arrest of cadets, these also being officers.[3] Specific provisions, however, on the subject of the arrest of cadets are contained in pars. 264 to 269 of the Regulations of the Military Academy. It is here specified that a cadet when arrested shall, (except as further indicated,) "confine himself to his quarters until released" by the Superintendent; and rules are prescribed in regard to his action and *status* while in arrest.

III. ARREST OF ENLISTED MEN.

This subject is regulated mainly by the 66th and 70th Articles of war, but in part also by Arts. 67, 68 and 69.

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[1] See De Hart, 80; Benét, 47–8.

[2] Precedents of cases of officers convicted of breach of arrest in leaving their quarters and going at large, after their trials had been completed, but before they had been duly released from arrest, are found in G. O. 80, Army of the Potomac, 1862; Do. 43, Dept. of the East, 1864; G. C. M. O. 15, War Dept., 1866.

[3] *Ante*, p. 78, note.

Provision of Art. 66. This Article declares that:—"*Soldiers charged with crimes shall be confined until tried by court-martial, or released by proper authority.*"

General effect. The term "crimes," like the word "crime" employed in Art. 65 and heretofore interpreted, is evidently a general designation intended to include all substantial military offences, both those purely military and those having a civil aspect. This Article prescribes a general rule of administration and discipline. Except so far as may be authorized in the case of Cadets, we have in our law no such system of disciplinary punishments, imposable by commanding officers independently of courts-martial, as is found in the European codes. Our soldiers, therefore, when, as it is expressed in the Article, "charged with crimes," must—to be legally punished—be "tried by court-martial." The great majority indeed of their offences are disposed of, comparatively summarily, by the inferior courts. But in all cases, the trial, by the direction of this Article, is to be preceded by arrest in the form of *confinement.* Enlisted men, however—and this indeed is also indicated by the use of the term "crimes"—should not be confined in arrest for trifling irregularities or petty derelictions.

By whom the arrest is to be made. While in a case requiring immediate action the arrest of a soldier may legally be made by any commissioned officer, or, if none be at hand, non-commissioned officer, the proper person in general to make or order the arrest is the officer commanding the company or other immediate commander of the offender. Such also is the proper authority to make the arrest of a non-commissioned officer. In practice, however, a discretion for making arrests of enlisted men on account of ordinary offences is commonly delegated by commanders to 1st sergeants or other non-commissioned officers.

Form of the arrest. "The arrest of a soldier is, properly, confinement."[1] It is indicated by the authorities[2] as a reason why confinement is the form of arrest specifically prescribed for enlisted men, that military superiors, if liberty were allowed the prisoner, would not have that security against escape which, as heretofore remarked, they have in the case of an officer allowed to be in arrest at large, and that, therefore, to make sure of holding the party, a closer arrest must in general be imposed.

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[1] Clode, M. L., 113; Manual, 28.

[2] Samuel, 641; Clode, M. L., 113; O'Brien, 154.

As to the *mode* in which the confinement is to be executed—the *private soldier*, when placed in arrest, is generally confined in the guard-house or other appropriate place of restraint, a sentinel being usually posted either without or within.[1] By a recent order,[2] however, it is prescribed that soldiers charged for trial by *summary court* shall not be so confined, but shall be "placed in arrest in quarters before and during trial and while awaiting sentence, unless in particular cases restraint may be deemed necessary." As to *non-commissioned officers*, it is directed in par. 996, A. R.,[3] that they "will not be confined at the guard-house in company with privates, but will be placed in arrest in their barracks or quarters, except in aggravated cases where escape is feared." The phrase "placed in arrest," as here used, evidently imports a mode of arrest similar to that prescribed for officers by Art. 65.

Status of arrest—Treatment. A prisoner is to be presumed to be innocent till duly convicted, and till thus convicted, he cannot legally be punished as if he were guilty or probably so. The arrest by confinement of an enlisted man with a view to trial and for the purposes of trial is wholly distinguished from a confinement imposed by sentence. It is a temporary restraint of the person, not a punishment, and should be so strict only as may be necessary properly to secure the accused. Anything further is unauthorized.[4] The imposition upon soldiers, while confined in arrest, of disciplinary punishments is, in our service, wholly illegal. In one of the Orders last cited,[1] Gen. Hancock condemns as unlawful the treatment of a soldier thus confined who was compelled to carry a heavy log for long periods, and, because of such treatment, remits the sentence subsequently imposed by the court. In a case promulgated by him in Orders,[2] Gen. Dix comments with severity upon the fact that three soldiers, arrested as deserters, were, before trial, besides being heavily ironed, paraded in front of the regiment with their heads shaved. In a further Order,[3] the reviewing authority reflects similarly upon the treatment of a soldier who, on arrest, had been imprisoned in a dark cell for fourteen days with ball and chain.

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[1] Simmons § 358; De Hart, 76. As to the form of arrest in cases of retainers, camp-followers and the like, this, in the absence of statutory provision on the subject, must be left to the discretion of the commanding officer, to be guided by the circumstances of the particular case.

[2] G. O. 21 of 1891.

[3] This regulation is taken from an almost identical provision formerly contained in the Queen's Regulations. Simmons § 358; Griffiths, 25. In the existing British law, the arrest of non-commissioned officers is even more closely assimilated than formerly to that of commissioned officers. See Manual, 30.

[4] See O'Brien, 154; G. O. 35, Dept. of the Cumberland, 1869; Do. 23, Dept. of the Lakes, 1870; Do. 106, Dept. of Dakota, 1871; G. C. M. O. 4, Dept. of the Columbia, 1881.

Placing irons on a soldier, while confined in arrest awaiting trial or sentence, can be justified only when the same may be necessary, or a proper precaution, to prevent an escape or the doing of violence. A resort to manacles may sometimes be required for the reason that no secure guard-house or other sufficient place of confinement exists at the station. It must always, however, be an exceptional measure, and should be reserved for extreme cases.[4]

Neither hard labor nor severe service should be exacted of a soldier while remaining in arrest.[5] Enlisted men in confinement awaiting trial or sentence should not be assimilated in their treatment to those under sentence, or required to perform labor with them. They should, however be given proper exercise, and may be put on drill or other light duty.[6] If a soldier in arrest be required by some exigency of the service to be employed on anything like continuous military duty, he should first be released from arrest. Placing him on duty would indeed suspend the arrest *per se.*[1]

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[1] G. 106, Dept. of Dakota, 1871.

[2] G. O. 23, Dept. of the Lakes, 1863.

[3] G. O. 35, Dept. of the Cumberland, 1869.

[4] Simmons § 359; Clode, M. L., 113; Id., 1 M. F,, 169; Manual 30; G. O. 26, Dept. of Cal., 1866. The following reference by Judge Story, in Steere *v.* Field, 2 Mason, 516, to the law relating to prisoners arrested for debt, is singularly applicable to cases of military prisoners held in arrest preparatory to trial, and shows also how old is the principle governing the general subject:—"By the ancient common law, prisoners were not allowed to be kept in irons, for the reason, assigned by Bracton, *quia carcer ad continendos non ad puniendos haberi debeat.* And Lord Coke significantly observes that where the law requireth that a prisoner should be kept in *salva et arcta custodia*, yet that must be without punishment to the prisoner."

[5] Manual, 30.

[6] Par. 999, A. R. And see Circ., Nos. 3 and 7, (H. A.,) 1890; G. C. M. O. 44, Division of the Atlantic, 1889.

A soldier, upon and during arrest, is entitled, unless a deserter,[2] to receive his regular pay;[3] his mere arrest cannot affect his right to pay. Nor can he be deprived of any article of property belonging to him, unless there be reasonable ground for apprehending that he may attempt to escape or otherwise violate discipline, and that the possession of such property may facilitate his doing so.[4] In such case the same may be taken in charge by the commander, to be returned at the conclusion of the proceeding.

Term of and Release from Arrest—Arts. 66 and 70. Art. 66 declares that the confinement in arrest shall continue until the soldier is "*tried by court-martial or released by proper authority.*" Art. 70 directs that:—"*No * * soldier put in arrest shall be continued in confinement more than eight days, or until such time as a court-martial can be assembled.*"[5]

Under Art. 66. The former provision, while it contemplates that the arrest shall be made with a view to trial, yet justifies the commander in terminating it without a trial, if in his judgment the facts as ascertained do not call for one, or a proper court cannot be assembled within a reasonable time. "Proper authority" to order a release would be the commander who imposed the arrest or who has convened the court,[6] or, where the case has passed beyond his official control, the department commander or other proper military superior at the time. Subject to the conditions of the statute of limitations, a release from arrest constitutes no impediment to a re-arrest and trial at a subsequent date.[7]

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[1] Hough, 401; Griffiths, 72.

[2] Par. 1513, A. R.

[3] Circ. No. 14, (H. A.,) 1890. The theory on which a soldier is held not entitled to be paid for a period during which he is detained in arrest by the civil authorities is that he is absent without leave, and so subjected to the forfeiture prescribed by par. 132, A. R.

[4] Compare Allen *v.* Colby, 47 N. H., 544.

[5] That this Article relates only to confinement *preliminary* to trial is remarked in Corbett's Case, 9 Benedict, 274.

[6] See G. O. 33, Fifth Mil. Dist., 1868.

[7] Hickman, 97.

Effect of Art. 70 in limiting term of confinement. The provisions of Art. 70 have already been considered with reference to *officers*. As to *soldiers*, the Article in effect directs that they shall be confined in arrest only till a court-martial can, in view of the exigencies of the service, practicably be assembled for their trial; the term of eight days being at the same time indicated as a reasonable period, not in general to be exceeded, for ordering and collecting a court.[1] The significance of the omission from the present form of the Article of the word "conveniently," which was originally inserted before "assembled," has already been remarked upon. In this modification the intent evidently was that the time for the assembling of the court, for the trial of an officer or soldier held in confinement, should no longer be a matter to be determined by the convenience of the commander or the command, but that in every case, where war or other controlling exigency did not prevent,[2] the court should be assembled at the earliest date at which, by the exercise of reasonable diligence, the members could be brought together. O'Brien[3] observes of the Article that its effect is "to make it obligatory on those having authority to assemble the court as speedily as may be. It also," he adds, "makes it a duty to bring all prisoners to trial by the first court having cognizance of their cases, which may convene." If indeed a court, having jurisdiction of the case, were already assembled, it would accord with the spirit of the Article if the accused were ordered before it as soon as practicable, and his detention in arrest thus correspondingly abridged.

Unreasonable arrests. In practice, however, enlisted men have not unfrequently been detained in arrest and confinement for long and apparently unreasonable periods before trial, and while the officer responsible in such a case would be amenable to military justice under the general—62d—Article, (as well as to a civil suit for damages,) it would be well if our code embraced a specific article corresponding to the recent 74th of the British articles, now incorporated in sec. 21 of the Army Act, which provides that an officer who "*unnecessarily detains a prisoner in arrest or confinement without bringing him to trial, or fails to bring his case before the proper authority for investigation,*" shall, on conviction, be liable to be cashiered, or to suffer some lesser punishment according to the circumstances of the case.

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[1] That Art. 70, in limiting the effect of Art. 66, does not make eight days an absolute limit, see Corbett's Case, *ante*. In Hutchings *v.* Van Bokkelen, 34 Maine, 126, a confinement of a deserter for ten days, it not appearing that a court-martial could meanwhile have been assembled, was held not in contravention of the Article. That the provision, "or until such time as a court-martial can be assembled," does not mean that the assembling of a court shall entitle the accused to release from arrest, is a point also noticed in Corbett's Case.

[2] In Delap's Case, a detention of the accused in arrest nearly three and a half months before trial was held not unreasonable, in view of the state of war then existing, (in Florida.) G. O. 13 of 1843.

[3] Page 155.

Where indeed soldiers of our army are detained in confinement for unreasonable periods prior to trial, or after trial and before promulgation of sentence, and have in their sentences been condemned to terms of imprisonment,—while the period of the detention cannot legally be credited upon the term of confinement in executing the latter, the same may well be mitigated and reduced by the reviewing authority, (in approving the sentence,) by a period equal to that of the protracted confinement in arrest.[1] This action has been repeatedly taken in practice.

Provisions of Arts. 67, 68 and 69. These Articles, (of which the originals are to be found in the Code of James II,) relate to the commitment of "prisoners" (mainly arrested soldiers) to the guard-house, and to their custody and disposition: they may, therefore, properly be considered in this connection.

Art. 67. This Article provides that:—"*No provost-martial, or officer commanding a guard, shall refuse to receive or keep any prisoner committed to his charge by an officer belonging to the forces of the United States; provided the officer committing shall, at the same time, deliver an account in writing, signed by himself, of the crime charged against the prisoner.*"

Duty and right of officer of the guard. The proper construction of this Article appears to be that it is thereby made mandatory upon the (provost-marshal[2] or) officer of the guard to receive and keep prisoners committed to his custody by any other military officer, in every case where a written charge of a military offence is presented at the same time with the prisoner,[1] but that, where no such charge is rendered, he is at liberty to refuse to receive the prisoner.[2] That he *may* receive and confine prisoners in the absence of a written charge is illustrated by par. 1001 of the Army Regulations, directing the discharge, (unless otherwise specially ordered,) of prisoners "without written charges" at the next guard-mounting; but that he may also, at his discretion, decline to receive them, under such circumstances, is deemed to be clear from the terms of the Article. Thus, while he may not unfrequently feel warranted in accepting into custody a prisoner upon a verbal charge alone where the committing officer is known to him as an officer in good standing in his own or another regiment or corps, he will yet be authorized, and it will be his duty, to refuse to accept him in a proper case,—as where, for instance, he has reason to believe that the officer is not responsible, or acting in good faith, or that the prisoner has not been guilty of a military offence.[1] In any such instance he is entitled, before consenting to take the party in charge, to insist upon, as a warrant for the commitment, a duly authenticated written accusation. To require the written statement will indeed be on all occasions the *preferable* course, as that which will best protect the soldier against unfounded arrests, ensure the prisoner against a neglect of his case and improper detention, and conduce to the order and convenience of the command.[2]

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[1] DIGEST, 170; G. O. 105 of 1874; G. C. M. O. 63 of 1874.

[2] As to this official, not at present known, as such, to our service in general—see Chapter XI.

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[1] Wolton *v.* Gavin, 16 Ad. & El. 69, 76. And see Id. 65, where Lord Campbell observes—"the duty of receiving and keeping the prisoner arises *eo instanti*" upon the one condition specified in the Article, *viz.*, the delivery of the written charge, being complied with; adding—"that the burden of making inquiry as to the propriety of the arrest is not cast upon the" officer of the guard, "but that he is bound to receive the prisoner immediately the condition is performed." And see Clode, M. L., 114. In the other principal adjudication upon this Article—Smith *v.* Shaw, 12 Johns., 169—the court remark:—"The Article virtually confers on any officer belonging to the forces of the United States the power of committing as prisoners such as have committed offences cognizable by military law." And see Hough, 473, who also construes the term "forces" (in the corresponding British article) as referring exclusively to the military forces, and observes that it does not preclude the officer from committing a prisoner that may happen to belong to a regiment or corps other than his own. "Forces of the United States," as employed in our Article, would certainly include a detachment of *marines* serving with the army as indicated in Art. 78.

[2] The American authorities, (see O'Brien, 155; De Hart, 73; Benét, 50,) have generally held that the officer of the guard is properly required to receive and confine the prisoner, (if a person amenable to military law and committed by a responsible officer,) whether a verified written charge be delivered with him or not; following here the view and using in substance the language of Simmons, (§ 362,) in treating of the corresponding British Article. But these authorities have not apparently recognized the marked distinction between the form of our article and the British; the latter not containing the word "provided," or any term of similar effect, but consisting of two separate and distinct clauses enjoining distinct and independent obligations.

The "account in writing," or charge. It will indeed be comparatively rare, in time of peace certainly, that the committing officer will not be enabled readily to comply with the proviso of the Article. The "account in writing of the crime charged" need not consist of a charge and specification in the form of the technical pleading upon which an accused person is arraigned before a court-martial, but may be of the most informal character, consisting merely of the name or description of the offence in general terms and as designated in common parlance—as "Drunkenness," "Disobedience of Orders," "Larceny," &c.[3] Further, to avoid the embarrassment of executing and filing a separate writing with each commitment, the name of the prisoner, with the offence charged, may conveniently be entered in a guard report book prepared with blanks for the purpose, with a blank also for the signature of the committing officer. Thus the latter, upon the delivery of the prisoner, will simply have to fill out, in the book, the particulars indicated and make the commitment official by his signature opposite, and the Article will be duly complied with. This is the form generally pursued at our military posts.

The military offence impliedly created by the Article. It may be remarked that, although the Article fails to assign any penalty for the act of refusing to receive and keep a prisoner when accompanied by a written charge, such act may properly be treated as conduct prejudicial to military order and discipline, and so punishable as an offence under Art. 62.[1]

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[1] See the last two notes.

[2] See G. O. 129, Dept. of the Gulf, 1864; Do. 26, Dept. of Cal., 1866.

[3] "It may not be in the power of the officer to give the precise charges which are to be exhibited against the accused, which are indeed subject to be altered by the commanding officer; therefore it is sufficient to exhibit such an accusation in writing, (signed by the party committing, with his name, rank and regt.,) as shall indicate the *nature* of the alleged offence." Hough, 474.

Art. 68. This Article prescribes as follows:—"*Every officer to whose charge a prisoner is committed shall, within twenty-four hours after such commitment, or as soon as he is relieved from his guard, report in writing, to the commanding officer, the name of such prisoner, the crime charged against him, and the name of the officer committing him; and if he fails to make such report, he shall be punished as a court-martial may direct.*"

Purpose of the Article. The chief intent of this statute evidently is to preclude the unreasonable detention without trial of the prisoners committed daily to the guard-house at posts, &c., and to secure them a prompt trial by bringing the cases, every twenty-four hours, (or at other brief regular periods,) to the attention of the commanding officer, who, upon an examination of the facts reported, may determine then and there, so far as in his power, whether the parties shall be tried or released.[2] Further, the report being duly made, the commander becomes the officer responsible for the proper disposition of the cases.[3] The commanding officer referred to in the Article is of course the head of the command by the guard of which the prisoners have been held, that is to say the officer commanding the regiment, detachment, garrison, post, &c.

The offence, how proved. The offence made punishable by the Article, of failing to make the required report, would be established by proof that no report whatever was made, or that it was not made in writing, or that it did not set forth some one or more of the particulars prescribed, or that it was not made at the specified time.[4]

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[1] In G. O. 33, Dept. of the South, 1864, is a precedent of a case of a Captain and Provost-Marshal of a Division, convicted of refusing to receive a prisoner committed to him by another officer with a written statement of the offence; the charge, though erroneously laid under the specific article, (the then 80th, now 67th,) being a sufficient pleading of an offence under Art. 62.

[2] See Hough, 489; Simmons § 361.

[3] See Hough, (P.) 23.

[4] See Hough, 490.

Art. 69. This Article directs that:—"*Any officer who presumes, without proper authority, to release any prisoner committed to his charge, or suffers any prisoner so committed to escape, shall be punished as a court-martial may direct.*"

Effect and construction. The object of the Article is to ensure the safe custody of soldiers under arrest and other prisoners, and to prevent their discharge except by the authority of the proper commander. It therefore makes punishable, at the discretion of the court, the *two* offences of *releasing a prisoner without authority* and of *suffering an escape.*

The term "any officer" while no doubt principally contemplating officers commanding post or camp guards, or in charge of places of confinement, will include also an officer to whom a prisoner may be specially committed as a personal trust, whether or not he be furnished with a guard. The term "any prisoner," though having probably special reference to soldiers confined under arrest, or the class of prisoners indicated in the two preceding articles, embraces any other species of prisoner properly committed to the charge of an officer of the army, whether member of the army, camp-follower, prisoner of war,[1] person held as a spy or for a violation of the laws of war, or other party, military or civil.

Unauthorized release. The fact of the omission to present any charge upon the commitment of the prisoner would not *per se* authorize his release.[2] Nor would the fact that the offence charged is a trivial one, or that the accused is innocent of the charge, or that the commitment is illegal, have such effect; these being circumstances to be considered and acted upon by superior authority.[3] The "proper authority" specified in the Article is of course the chief of the command by the guard of which the prisoner is held (and to whom the report required by the previous article has been made), or, in the case of a special personal trust, the authority imposing the same, or the military superior to whom the case may have been formally submitted for official action or under whose control it may otherwise have come.[1]

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[1] One of the most conspicuous cases of a breach of this specific article during the late war was that of a Lieut. commanding a guard on board a transport, who was convicted of suffering the escape of three Confederate prisoners of war, (commissioned officers,) in his charge. G. O. 8, Div. West. Miss., 1865.

[2] Hough, 480; Id., (P.) 23.

[3] 3 Hough, 480.

Suffering an escape. This was an offence punishable at common law about which much learning is to be found in the reports and treatises.[2] Two degrees or kinds of the offence were recognized—*voluntary escape* and *negligent escape*;[3] the term "escape" being used in criminal law to express the suffering of an escape on the part of the keeper more commonly than the act of the prisoner in getting away, which is technically known as "prison-breach" or "breach of prison." Voluntary escape is defined to be—"where the sheriff intentionally or knowingly permits the prisoner to go at large;" negligent escape—"where the prisoner breaks out of prison and is at large, without the consent, but through the negligence, express or implied, of the sheriff."[4] The former offence was viewed as a graver one than the latter; its degree in law being held to be the same as that of the original crime of the prisoner whose escape had been permitted; so that, if the prisoner were confined for felony, the voluntary suffering of the escape on the part of the keeper would be indictable as felony.[5] A "negligent" escape did not rise above the degree of misdemeanor.[6]

It is quite clear, under the general language of the present Article, (and has been thus held by Hough,[7]) that the offence made punishable therein may consist either in a voluntary act or an act of negligence; and it is manifest that the former would properly call for a more severe punishment than the latter.[1]

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[1] Id. And see Simmons § 361.

[2] See Steere *v.* Field, 2 Mason, 486, and cases cited; 2 Bishop, C. L. § 1092–1106; 1 Hale, P. C., 590–605; 2 Hawkins, c. 19; 1 Gabbett, c. 20.

[3] 1 Russell, 418; 2 Bishop, C. L., § 1095.

[4] Adams *v.* Turrentine, 8 Ire., 147.

[5] 1 Russell, 418; 4 Black. Com., 130; 2 Wharton, C. L. § 1667; 2 Bishop, C. L. § 1095, 1099; Weaver *v.* Com., 29 Pa. St., 445.

[6] Dalton, c. 159, 2 Wharton, C. L. § 1667.

[7] This author, (p. 484,) referring to the corresponding British article, observes that the offence is committed "not only where the officer allows the prisoner to escape, (intending it to take place,) either by preconcert or by giving the opportunity with a criminal intention, but also and equally where, by want of precaution, or the neglect of duty, or disobedience of orders issued relative to the security of prisoners, the escape takes place."

So, such of the principles of the law relating to the criminal offence as are opposite to military cases may well be here applied. For example, at common law, the fact that the prisoner returned of his own accord did not, *per se*, excuse a negligent escape, (*i. e.* suffering of an escape,) once consummated.[2] Nor did the fact of a recapture of the prisoner have such effect,[3] unless he were immediately pursued and retaken before being lost sight of.[4] The death of an escaped prisoner before recapture did not "purge" the escape.[5] The rule, however, as to what acts will constitute negligence is not so strict at the military as at the common law.[6] Thus, where a prisoner has succeeded in effecting his escape through the insecurity or inadequacy of the guard-house or prison, which it was the business of superior authority to have made secure or sufficient, the officer in charge cannot in general properly be held responsible under this Article. Otherwise, however, where the escape is effected by reason of a neglect on his part to take precautions within his power and duty. As where he neglected to cause the prisoner to be properly restrained or guarded;[1] or where he failed to have him searched when there was reasonable ground to believe that he might have, and he had in fact, an implement suitable for securing his escape concealed upon his person; or where he permitted the prisoner to have private interviews with improper persons by whose aid the escape was facilitated.[2]

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[1] 4 Black. Com., 130; Hough, 481, 485. Blackstone observes that an "officer permitting an escape, either by negligence or connivance, is much more culpable than the prisoner" whose escape is effected. Hough, 487, cites an exceptionally severe and ignominious sentence adjudged in India in 1819, and confirmed, in a case of a native officer, convicted of gross negligence in suffering the escape of an important prisoner, (under circumstances indicating also connivance,) as follows: "To be dismissed the service, to have his sash burnt, and his sword broke over his head, in front of the troops at the station; after which to have a halter tied round his neck, and to be drummed out of cantonments."

[2] Bank of U. S. *v.* Tyler, 4 Peters, 389; Briggs *v.* Cramer, 2 South., 498; Nall *v.* State, 34 Ala., 262. So, in G. C. M. O. 25, Dept. of Cal., 1883, Gen. Schofield, in approving a conviction of a violation of Art. 62 in allowing a convict prisoner to escape, remarks:—"Neither the re-capture of an escaped prisoner, unless the same be immediate, nor the subsequent voluntary return of the prisoner himself, can excuse an escape suffered through a neglect of duty on the part of the keeper."

[3] Bank of U. S. *v.* Tyler, *ante.*

[4] 1 Russell, 419; 2 Bishop, C. L. § 1095; Whitehead *v.* Keyes, 1 Allen, 350.

[5] Whicker *v.* Roberts, 10 Ire., 485.

[6] The common law rule was that nothing short of an act of God, or of the public enemy, or of irresistible adverse force, (as in case of *rescue*,) would excuse a *negligent* escape. (2 Wharton, C. L. § 1668.) It may be added that the strict common law rule that "every liberty given to a prisoner not authorized by law" is a voluntary escape, (Steere *v.* Field, *ante*,) is not applicable to military cases. Such a liberty, if the prisoner was thereby enabled to get away, would be evidence of the voluntary or the negligent act, according to circumstances.

As to the proof of the offence, it is further held at the common law—and the same principles are applicable here—that, while it should appear that the arrest and commitment were legal,[3] it need not be shown that the prisoner was actually guilty of the offence for which he was arrested,[4] or that the officer had knowledge of his guilt.[5] The latter, at military law, is absolutely required to hold the prisoner duly entrusted to his charge, without any regard whatever to the question of his guilt or innocence—an issue which cannot be, directly or indirectly, taken cognizance of in this proceeding.

It is further held by the authorities that the mere fact of escape, appearing without other circumstances, raises a presumption of at least negligence on the part of the keeper, and that the *onus* of rebutting this presumption then rests upon him;[6] and a similar rule may in general be applied to a case of escape suffered by a military officer."[1]

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[1] See Hough, 480.

[2] Id., 479.

[3] 1 Russell, 417; 2 Wharton, C. L. § 1667; 2 Bishop, C. L. § 1094.

[4] 2 Hawkins, c. 28, s. 16; 2 Wharton, C. L. § 1668, note. Nor, as remarked under the head of *unauthorized release*, is it material whether the offence with which the prisoner was charged was a grave one or the reverse. This point, however, may be considered in awarding punishment.

[5] Weaver *v.* Com., 29 Pa. St., 445. Nor can the officer show, *by way of defence*, that the prisoner was in fact innocent of the offence charged. Nor, in a case of an alleged suffering of an escape of a prisoner while *under sentence*, would it be admissible for him to show, in defence, that the sentence was illegal.

[6] "An escape implies the negligence or connivance of the officer." 1 Gabbet, 298. And see 1 Hale, P. C., 601; 1 Russell, 419; 2 Wharton, C. L. § 1668; 2 Bishop, C. L. § 1096; Adams *v.* Turrentine, 8 Ire., 147; Blue *v.* Com., 4 Watts, 215.

While the offences of voluntary and negligent escape are distinct, it is yet held that gross negligence may be given in evidence to show a voluntary escape,[2] and further that, under an indictment for a voluntary escape, the defendant may be convicted of a negligent escape, the former offence properly including the latter.[3] So, at military law, where the specification, under a charge of a violation of the present Article, sets forth an escape in its nature voluntary, the charge will be sustained by proof of acts of negligence only, and the accused may be convicted of both charge and specification, the proper exceptions and substitutions being made in the finding upon the latter.

The present Article applies only to officers.[4] A non-commissioned officer, or soldier, (as a sentinel or guard,) permitting an escape, is of course liable, for his offence, to charges and trial under Art. 62. So also is the enlisted prisoner who effects his escape: if his design, however, is not merely to evade his confinement but to abandon the service, his offence is *desertion.*

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[1] See O'Brien, 156.

[2] Smith *v.* Hart, 1 Brev., 146.

[3] Skinner *v.* White, 9 N. H., 204; Fairchild *v.* Case, 24 Wend., 380; Nall *v.* State, 34 Ala., 262.

[4] It may be noted that in U. S. *v.* Clark, 31 Fed., 714, the Court erroneously supposes the Article to apply to a case of escape suffered by a *non-commissioned* officer.

CHAPTER X.

THE CHARGE.

The Arrest of the accused is usually accompanied or presently followed by the service upon him of the charge or charges upon which it is proposed that he be tried. Here then may properly be presented the general subject of the military Charge, as framed, preferred, completed and served; leaving the forms of specific charges to be indicated in the Appendix.

The subject will be considered under the following heads:—

I. Nature, form, and requisites of the Charge in general.
II. Rules for framing the Charge derived from the law of Indictments.
III. Rules of military law in regard to the framing of the Charge.
IV. The Preferring of Charges.
V. The Referring of Charges for trial.
VI. Amendment of Charges after reference for trial.
VII. Additional Charges.
VIII. The Service of Charges.

I. NATURE, FORM, AND REQUISITES OF THE CHARGE IN GENERAL.

Definition, and Formal Parts. The Charge, in the military practice, like the indictment of the criminal courts, is simply a description in writing of the alleged offence of the accused. In the great majority of cases it is the only formal written pleading upon a trial by court-martial.

In our practice this pleading, to which as a whole the name of Charge is applied, is divided into two portions; the first in order being, in contradistinction to the other, technically called "charge," and the second being termed the "specification." The office of the *charge*, in this its relative sense, is to designate the specific military offence, made punishable by an Article of war or other statute, which is attributed to the accused: that of the *specification* is to set forth the acts or omissions of the accused claimed to constitute the offence named in the *charge.*[1]

Object and Essentials. The purpose and province of the Charge are:—1st. To so inform the accused as to the precise offence attributed to him that he may intelligently admit, deny, or plead specially to, the same; and may be enabled to plead his conviction or acquittal upon any subsequent prosecution on account of the same act; 2d. To advise the court and the reviewing authority of the nature of the accusation, and of the Article or other statute upon which it is based, so that the former may rightly and judiciously try, determine, and (upon conviction) sentence, and the latter may understandingly pass upon all the proceedings.[2]

Such being the nature and object of the Charge, it may be said, generally, as to its requisites—1, that it must be laid under the appropriate Article or other statute; 2, that it must specify the material facts necessary to constitute the alleged offence.[3]

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[1] The difference between this manner of statement and that formerly employed in the British service, where charge and specification were usually blended together, and the pleading was inartificial as compared with our form, is remarked upon in the opinion of Atty. Gen. Cushing in Col. Montgomery's case, (7 Opins., 603,) and may be noticed in James' Collection of Precedents, and the works, especially, of Hough and D'Aguilar. In the late "Rules of Procedure," however, the forms of charges are carefully revised, and the mode of statement is now more nearly assimilated to our own. See Appendix.

[2] See 1 Opins. At. Gen., 296; Kennedy, 69; Remarks of J. A. Gen. Sutton in Col. Quentin's Trial, p. 81; Macomb, 25; O'B.ien, 234; De Hart, 287, 291–2. As to the similar purpose and use of the indictment, Bronson, C. J., in People *v.* Taylor, 3 Denio, 95, observes:—"Certainty is required to the end that the defendant may know what crime he is called upon to answer; that the jury may be able to deliver an intelligible verdict, and the court to render the proper judgment; and finally that the defendant may be able to plead his conviction or acquittal in bar of another prosecution for the same offence." And see 2 Hale, 187, note 7; 2 Hawkins, c. 25, s. 59; Starkie, 73; 1 Chitty, C. L., 168, 229; 2 Gabbett, 198; Wharton, C. P. & P. § 166; 1 Bishop, C. P. § 506, 507; Gould, 71; Rex *v.* Horne, Cowper, 682; U. S. *v.* Mills, 7 Peters, 142; U. S. *v.* Cruikshank, 92 U. S., 544; Biggs *v.* People, 8 Barb., 550; State *v.* Stimson, 4 Zabr., 25.

[3] "If any fact or circumstance which is a necessary ingredient in the offence be omitted, such omission vitiates the indictment. * * *

Assimilated to the Indictment. In these requisites, and especially in the second, the Charge resembles the Indictment. These particulars, therefore will be better understood by a reference to those rules for the framing of indictments which are most apposite to military pleadings. But our law has prescribed no specific form for the Charge in the case of any offence,[1] and for this reason, and because a succinct directness in diction, as well as in action, is of the essence of the military system, the Charge is very much briefer, simpler, and less technical than is the Indictment.[2] In our practice a charge, and especially a specification, which fails to set out a legal offence, or is indefinite, redundant, or otherwise defective, may be struck out, in whole or in part on *motion*. [See Chapter XVI.] But in general a specification is allowed to stand without objection, provided it sets forth at least a military neglect or disorder, though this may not be the specific offence designated in the charge. Thus the form

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Any fact or circumstance laid in the indictment which is not a necessary ingredient in the offence may be rejected as surplusage." 2 Hale, 187, note 7. "The want of a direct allegation of anything material in the description of the substance, nature, or manner of the crime, cannot be supplied by any intendment or implication whatsoever." 2 Hawkins, c. 25, s. 20. "Every fact which is an element in a *prima facie* case of guilt must be stated; otherwise there will be at least one thing which the accused person is entitled to know, whereof he is not informed." 2 Bishop, C. P. § 519. And see 1 Chitty, Pleading, 228.

[1] 7 Opins. At. Gen., 603; Kennedy, 69. Usage, not statute, has dictated the forms of our Charges.

[2] "A specification does not need to possess the technical nicety of indictments at the common law. Trials by court-martial are governed by the nature of the service which demands intelligible precision of language, but regards the substance of things rather than their forms. * * * Hence undoubtedly the most bald statement of the facts alleged as constituting the offence, provided the legal offence itself be distinctly and accurately described in such terms of precision as the rules of military jurisprudence require, will be tenable in court-martial proceedings, and will be adequate groundwork of conviction and sentence." Cushing, 7 Opins., 604. And see People *v.* Porter, 50 Hun., 61. "The charge or charges are, properly speaking, an indictment, and must, in their *substance*, possess all its essential requisites, although in *form* the military judicial procedure is less fettered by peculiar and customary solemnities of expression than the civil." Tytler, 209. And see Remarks of J. A. Gen. Sutton, in Col. Quentin's Trial, p. 81; O'Brien, 232; De Hart, 285, 287. In some instances the form of the indictment has been closely followed in military charges. Note a pointed example in an elaborate and technical specification under a charge of Manslaughter, in G. O. 20, Fifth Mil. Dist., 1868.

of the accusation, as framed for trial by a military court, need be and commonly is much less artificial than that of an indictment. But in cases of difficulty and importance, the criminal indictment will always be the model of the careful military pleader, both for the statement of essentials and their orderly and logical[1] arrangement.

II. RULES FOR FRAMING THE CHARGE DERIVED FROM THE LAW OF INDICTMENTS.

The Charge to be Certain. "An important requisite in all pleading," says Gould,[2] "is *certainty*." This requisite, he adds, "implies that the matter pleaded must be clearly and distinctly stated, so that it may be fully understood by the adverse party, the counsel, the jury and the judges." Stephen[3] writes:—"It" (the pleading,) "must be particular or specific, as opposed to undue generality." This rule, Archbold[4] remarks, is especially to be observed with the *gist* of the pleading; matters of *inducement* or explanation, for instance, not calling for the same precision. It is further well said in this connection by Stephen[5]:—"To combine with the requisite certainty and precision the greatest possible brevity is now justly considered as the perfection of pleading."

But this authority[6] subjoins the qualification that—"No greater particularity is required than the nature of the thing pleaded will conveniently admit." Or, as it is expressed by Archbold[1]—"Where the offence cannot be stated with complete certainty, it is sufficient to state it with such certainty as it is capable of." And by the former writer the further exception is mentioned,[2] that—"Less particularity is required when the facts lie more in the knowledge of the opposite party than of the party pleading."

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[1] "All pleading is essentially a logical process." In analyzing a correct pleading, "if we take into view, with what is expressed, what is necessarily supposed or implied, we shall find in it the elements of a *good syllogism*." Gould, 4.

[2] Page 71. And see 2 Hawkins, c. 25, s. 71, 74; 1 Chitty, P., 169; 2 Gabbett, 197, 227; Wharton, C. P. & P. § 151, 166; 1 Bishop, C. P. § 323; U. S. *v.* Mills, 7 Peters, 142; State *v.* Stimson, 4 Zabr., 25. In the last case the court say:—"But the particularity required is not such as to screen the offender from conviction, or to embarrass the prosecution with useless technicalities."

[3] Page 132.

[4] Page 88, note 1. And see 2 Gabbett, 199, 236; Stephen, 132; Wharton, C. P. & P. § 165. The classification by Gould, (p. 141,) of the averments in civil, applicable also to criminal, pleadings, may be noted in this connection, as follows:—"All facts alleged in good pleading consist either, 1, of the *gist*, or substance, of the complaint or defence; or, 2, of matter in *inducement*," (*i. e.*, introduction or explanation,) or, 3, of matter of *aggravation*;" everything else, he adds, being "*surplusage*."

[5] Page 422.

[6] Page 367.

The rule as to *certainty* is, as a general principle, applicable to the military Charge in the same manner as to the criminal indictment or declaration of the civil practice,[3] and will properly be observed in framing specifications. Because, however, of the exceptional authority possessed by courts-martial in their findings,[4] of correcting errors and imperfections of detail in specifications, by substituting the true item or term, as indicated by the testimony, for the uncertain or incorrect one originally inserted, a military pleading will more readily admit of an uncertain statement, (in an allegation, for example, as to amount, number, quantity or other particular of description,) than will an indictment.

Not to Contain Surplusage. Strictly, any allegation in a Charge, not properly required for the due and full statement of the offence, is surplusage.[1] Stephen,[2] in laying it down that surplusage, which he defines "unnecessary matter of whatever description," is to be avoided, divides it into—(1) "matter wholly foreign," and (2) "matter which, though not wholly foreign, does not require to be stated." Military writers also condemn all "superfluous" or "extraneous matter",[3] which is however to be distinguished from matter of inducement or aggravation. *Mere* surplusage will always be carefully winnowed out of his pleading by the careful draftsman. If allowed materially to encumber a specification, it may prove a source of considerable embarrassment to a court-martial, in bewildering the issue, and particularly in raising in their minds a question whether *proof* of such matter, in whole or in part, may not be called for. In point of fact, however, surplusage never requires to be proved, and is not to be taken into consideration by the court in their findings or judgment. In the civil practice, it is often, where wholly foreign, stricken out on motion, and in the military practice a similar course may be taken. But if left to form a part of a pleading or Charge, it cannot affect its legal validity, since *utile per inutile non vitiatur*.[4]

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[1] Page 88, note 1. "Certainty to a common intent," (*i. e.*, a reasonable amount of certainty,) "is all that is required." U. S. *v.* Fero, 19 Fed., 904, citing Stoughton *v.* State, 2 Ohio St., 562.

[2] Page 370. An indictment need not negative what is matter of defence. 1 Bishop, C. P. § 638; U. S. *v.* Stevens, 4 Wash., 547. "In general, all matters of defence must come from the defendant, and need not be anticipated or stated by the prosecutor." 1 Chitty, P., 231. In Sir Ralph Bovy's Case, 1 Ventris, 217, Chief Justice Hale is quoted as saying of the allegation of matter which should come more properly from the other side:—"'Tis like leaping before one come to the stile."

[3] See Tytler, 209, 214; Kennedy, 69; O'Brien, 234; De Hart, 287. While the general rules of pleading are substantially the same in the criminal and civil procedure, the practice of the courts is to require greater strictness in criminal than in civil pleadings; and in the former greater strictness in indictments for the graver, especially the capital, crimes than in those for mere misdemeanors. 1 Bishop, C. P. § 321. "Military offences," says Kennedy, (p. 73,) are, "with a few rare exceptions, *of the nature of* misdemeanors."

[4] See Chapter XIX.

Not to be Repugnant or Inconsistent. That is to say, that the material portions of the Charge are not to be opposed in meaning or effect, or to contradict each other. This rule is repeated by all the principal authorities, civil and military.[5] It is an important one, since a failure to observe it may result in nullifying the Charge, or at least the specification in which the repugnancy occurs.[6]

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[1] See Gould, 41, 142; 1 Chitty, P., 173; 2 Gabbett, 200; Wharton, C. P. & P. § 158; 1 Bishop, C. P., Ch. XXXII.

[2] Pages 422–3.

[3] Griffiths, 61; Hughes, 143; Macomb, 26; O'Brien, 234–5; De Hart, 299.

[4] See Stephen, 424; Gould, 142; 1 Bishop, C. P. § 446, 478.

[5] Stephen; 377; Gould, 144; Starkie, 273; 1 Archbold, 91; 1 Chitty, P., 173, 231; 2 Gabbett, 199, 235; Wharton, C. P. & P. § 256; 1 Bishop, C. P., Ch. XXXIV.; Hough, 41; Kennedy, 76; De Hart, 287.

[6] "Repugnancy is two inconsistent allegations in one pleading. As both cannot be true, and there is no means of ascertaining which is meant, the whole will be as though neither existed." 1 Bishop, C. P. § 489. "It takes off much from the credit of an indictment that those by whom it is found have contradicted themselves." 2 Hawkins, c. 25, s. 62.

Nor Ambiguous. That is to say, the Charge must not contain allegations of which the meaning is obscure or equivocal, and which are susceptible of different interpretations.[1]

Nor Argumentative.[2] Or, as it is expressed by Stephen[3]—pleadings "must advance their positions of fact in an absolute form, and not leave them to be collected by inference and argument only."

Matter of Evidence not to be Stated,[4] It is not good pleading, in alleging a fact, to state the circumstances proving or tending to prove its truth.[5] Such are the acts, occurrences and matters of description which should properly form part of the testimony of the witnesses. Such indeed are *some* matters of aggravation, although such matters are to a reasonable extent allowed to be recited and are not unfrequently added in a military Charge.[6] But, strictly, the only facts apposite to be stated are those constituting the offence in law. Where, however, the Charge is of a general character, especially where it is laid under the 61st, (or, sometimes, under the 62d Article,) the circumstances, and matters of inducement and aggravation, surrounding the alleged punishable act of the party, and going to characterize it as an instance of the offence charged, are often required to be more fully set forth than in the case of one of the exact offences, and the rule against pleading matters of evidence is not to be so rigorously applied.[7]

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[1] Stephen, 378; 1 Chitty, C. L., 231; 2 Gabbett, 200; 1 Bishop, C. P. § 510. But "where a matter is capable of different meanings, that will be taken by the court which will support the proceedings, not that which would defeat them." Chitty, 231.

[2] "The object being to communicate facts and not reasons, an argumentative form of expression, obscuring the facts, is not adequate." 1 Bishop, C. P. § 508. And see Gould, 55; Kennedy, 76.

[3] Page 384.

[4] Stephen, 342; 1 Chitty, C. L., 231; U. S. *v.* Bachelder, 2 Gallison, 15; Evans *v.* U. S., 153 U. S., 584; Stokes *v.* U. S., 157 U. S., 191.

[5] Stephen, 342. This author adds, (p. 346,) that this rule tends perhaps more than any other to prevent "minuteness and prolixity of detail."

[6] The statement of the law by O'Brien, (p. 234) that—"All aggravating circumstances of the guilty act must be alleged in the specification," or they cannot be put in evidence, is of course erroneous.

[7] As a kindred rule to that excluding matters of evidence, may be noted here the one given separately by Stephen, (p. 353,) that—"It is not necessary to allege circumstances necessarily implied."

Nor Matter of Law. Any statement of the law, or of conclusions or presumptions of law, is altogether out of place in a good pleading.[1] As it is observed by Gould[2]—"Judges are always presumed to know judicially what the law is; and have therefore no occasion to be informed of it by the pleadings." As to conclusions of law, it is the business of the court to make these for itself, deducing them from the facts as they are stated and appear in evidence. To assume to express such conclusions in a Charge or indictment is irrelevant and impertinent.

Nor Matters of which the Court will take Judicial Notice, ex officio. It is remarked by Stephen[3] that "besides points of law, there are many other matters of a public kind of which the court takes official notice, and with respect to which it is, for the same reason, unnecessary to make allegation in pleading." Such are—the law of nations; the provisions of the Constitution, public statutes, executive proclamations; and, (in the military practice,) the formal General Orders, circulars, and other publications to the army emanating from the War Department; the political frame-work, officers and operations of the government; matters of public history; the powers of the President and heads of departments; the "established and usual course" of the proceedings of Congress; the main geographical features and the local divisions of the country; the "meaning of words in the vernacular language;" the "course of time;" the "legal weights and measures;" the current coins and other circulating medium.[4] "In fine," adds Greenleaf,[5] "courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction." All matters of this description, therefore, do not need to be alleged, or enlarged upon, as facts, in the pleading or Charge; such allusion to them as will indicate what is meant or referred to being all that is necessary.[1]

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[1] Stephen, 345, 346. 1 Chitty, C. L., 231; 2 Gabbett, 199, 229; Wharton, C. P. & P. § 154; 1 Bishop, C. P. § 329. 514, 515; Rex *v.* Lyme Regis, 1 Doug., 159. In U. S. *v.* Almeida, Whart. Prec., 1061, Kane J. remarks:—"It is not enough, and never has been, to charge against the party a mere legal conclusion, as justly inferential from the facts that are not themselves disclosed on the record. You may not charge treason, murder, or piracy, in round general phrases. You must set out the act which constitutes it in the particular case." In some cases of familiar military offences, of which the constituents are simple and generally the same, this rule is not strictly observed, as in cases of *desertion* for example. See *post*.

[2] Page 43.

[3] Page 349. And see 1 Chitty, C. L., 231.

[4] See 2 Hawkins, c. 25, s. 100; Stephen, 347-349; 1 Greenl. Ev. § 5, 6.

[5] 1 Ev. § 6.

Statement of Name, Office, Rank, &c. The name of the accused should be given with such particularity as to identify him and distinguish him from any other person.[2] It is held by the U. S. Supreme Court,[3] and generally by the courts of the States,[4] that the middle name is no part of the legal name, and may be omitted in stating it. The good pleader, however, will prefer to add it, or its initial, if within his knowledge; and it must be added where necessary to distinguish the person. Where the accused is known by two names, as in a case of a soldier re-enlisting under an assumed name in violation of the 50th Article of war, and it is doubtful which name is his true one, he may be distinguished by either, the other being added under an *alias*.[5] The rank, office, regiment, corps, capacity, &c., of the accused are, by invariable usage, set forth in a military pleading, and should always be added, whether the accused be an officer or enlisted man, or a retainer, camp-follower, &c.[6] If no military rank, office, or employment were given, the presumption would be that the party was not within the jurisdiction of a court-martial. Where since the date of his alleged offence the accused has been promoted, he should properly be designated at the commencement of the specification as of his present rank, but in describing the commission of the offence, the rank which he held at the time should be stated.[1] As by the words—"he the said A. B. then being," (specifying his former rank and office,) or in terms to such effect. And so, in the case of any other change in the military status, as of regiment, arm, corps, &c., which has intervened since the alleged criminal act. Errors, however, in the statement of rank, regiment, &c., are such as may be corrected by the court in the Finding.

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[1] Stephen, 348.

[2] See Stephen, 301; Starkie, 49, 203; 1 Chitty, C. L., 202; 1 Archbold, 78; Wharton, C. P. & P. § 96.

[3] "The law knows of but one Christian name, and the omission or insertion of the middle name, or of the initial letter of that name, is immaterial." Games *v.* Stiles, 14 Peters, 327. And see Keene *v.* Meade, 3 Peters, 7; Lessee of Dunn *v.* Games, 1 McLean, 321; also 2 Opins. At. Gen., 332, 3 Id., 467.

[4] Hart *v.* Lindsey, 17 N. H., 235; Franklin *v.* Tallmadge, 5 Johns., 84; Roosevelt *v.* Gardiner, 2 Cow., 463; Bratton *v.* Seymour, 4 Watts, 329; Price *v.* State, 19 Ohio, 53; State *v.* Martin, 10 Mo., 361; State *v.* Williams, 20 Iowa, 98; Erskine *v.* Davis, 25 Ills., 251; State *v.* Manning, 14 Texas, 402; People *v.* Lockwood, 6 Cal., 206, &c.

"Junior," or "Jr.," is no part of the legal name. 1 Bishop, C. P. § 687, and cases cited.

[5] See Simmons § 390; and compare 1 Chitty, C. L., 203; 2 Gabbett, 214, 217; Wharton, C. P. & P. § 99, 103; 1 Bishop, C. P. § 681.

[6] Tytler, 214; Kennedy, 70; Simmons § 388; G. O. 22, Army of the Potomac, 1861. It is never necessary in a military charge to set out the fact of the appointment or commission of an officer. "In an indictment against a public officer for a breach of duty, it is sufficient to

Similar rules apply, though with less strictness, to the statement of the name, office, &c., of a person or officer injured, disobeyed, disrespectfully addressed, &c., by the accused,[2] or other party material to be mentioned in the pleading.[3] If the name of the person is not known, he should be referred to in the specification as "a person unknown," or in words to that effect.

Statement of Time and Place. While it is laid down as a general rule by the authorities that the *time*, (year, month, and day of the month,) and the *place*, of the alleged criminal act, should be stated with certainty, it is also held that, where not of the *essence* of the offence, the *precise* day and *exact* locality of its commission are immaterial and need not be averred; it being sufficient simply to allege a time and place within the jurisdic-

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state generally that he is such officer, without setting forth his appointment to the office." 1 Chitty, C. L., 231. In military charges it is not the practice even to state, by a direct allegation, that the accused, (or other officer referred to,) *is* such an officer; the description of the office being merely added, as a designation, to the name of the party—as "A. B., Captain, First Regiment of Infantry, United States Army;" or "Captain A. B., First Regiment," &c.

[1] See 3 Opins. At. Gen., 548. The mere fact, however, that the rank of the accused is misstated does not vitiate a specification, if there is no question as to the identity of the party. G. O. 38, Army of the Potomac, 1863.

[2] G. C. M. O. 61, Dept. of the Mo., 1871. And compare State *v.* Irwin, 5 Blackf., 343; Wharton, C. P. & P. § 109.

[3] See Butler *v.* State, 5 Blackf., 280. If not known by name, the party may be described as a "certain person unknown." 1 Bishop, C. P. § 378; Wharton, C. P. & P. § 111.

tion of the court.[1] In military charges there is still greater margin allowable, since the *place* or region of jurisdiction is much more extensive than that of the county, district, State, &c., to which the jurisdiction of the criminal courts is limited. Thus if a specification to a military charge is so framed as to advise the accused of the particular act of offence intended to be alleged, and enable him to plead a former conviction or acquittal if subsequently brought to trial on account of the same act, it will be strictly sufficient in law if it set forth a *time* within the limitation of Art. 103, and a *place* within the United States,[2] (or within the territory of a foreign country when, by reason of war or otherwise, the army is authorized to be there.[3])

But this latitude need rarely be availed of, and it is always desirable that the time and place should be stated *exactly*, or as nearly so as practicable. Where they are not precisely known, it is the practice to describe the offence as having been committed "on or about" a certain date and "at or near" a certain locality named; the date and locality specified being the nearest ascertainable.[4] Where the offence is one which has been committed from one day to another, or commenced on one day and completed on another, it may properly be alleged in the specification to have been committed on or between certain days named;[1] but if these dates are so far apart that the offence intended to be charged cannot reasonably be distinguished, the pleading is defective, and, upon exception taken by the accused, by motion to strike out,[2] or otherwise, should be required by the court to be amended.[3]

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[1] 1 Chitty, C. L., 224; 1 Archbold, 85; Stephen, 392; Wharton, C. P. & P. § 120, 139; 1 Bishop, C. P. § 375, 386; U. S. *v.* Burch, 1 Cranch, C. C. 37; Johnson *v.* U. S., 3 McLean, 89; McBryde *v.* State, 34 Ga., 203.

[2] "The Secretary of War directs that it be announced to the Army, for the information and guidance of courts-martial, that although in the specification to charges, time and place ought to be laid with as much certainty and truth as may be practicable, still it is *sufficient in law* to prove the offence to have been committed at any other place and time within the jurisdiction of the court." G. O. 16 of 1853. And see Simmons § 394; De Hart, 288; DIGEST, 230. And compare 1 Opins. At. Gen., 295–6, (Lieut. Gassaway's Case.) That time and place need not be strictly *proved* as laid, see G. O. 6, Dept. of Utah, 1861; Do. 57, First Mil. Dist., 1867; DIGEST, 232.

[3] See Chapter VIII.

[4] Simmons § 394; Harcourt, 115; Macomb, 25; O'Brien, 235; De Hart, 291; DIGEST, 230–31. In the British practice, the word "*between*"—as between certain dates named—is often used in allegations of time. Story, 55. These alternative forms would probably not be regarded as admissible by the criminal courts. See U. S. *v.* Crittenden, Hemphill, 61.

In some cases the offence committed is of a *continuing* character, extending over a considerable period of time or exhibiting a general habit or course of conduct. In such cases where distinct acts cannot readily be separated and attributed to particular dates, it is allowable to charge the misconduct in form somewhat as follows: "This during (or in or between) the months of ———," (specifying the particular months or other periods.[4]) A continued non-payment of a debt charged as dishonorable conduct under Art. 61 may be described, as to *time*, thus—"This on or about (a date named) and continuously up to the present time;" or—"This from (a date named) to the present time." In such cases the charge should be *dated.*

As it has been held by the Judge Advocate General, the allegations of time and place may be *omitted altogether*, without affecting the legal validity of the proceedings or sentence, provided the same sufficiently appear from the testimony in the record.[1] Such an omission, however, would be negligent and hazardous, and is now of rare occurrence.[2]

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[1] DIGEST, 231. And see Simmons § 394; 1 Bishop, C. P. § 396, 397.

[2] See Chapter XVI.

[3] DIGEST, 231; G. C. M. O. 16, Dept. of the Mo., 1890. And see cases in G. O. 193, Dept. of the Potomac, 1862; Do. 98, Dept. of N. Mexico, 1862; Do. 36, Dept. of the Mo., 1863. In Capt. Trenor's Case, published in G. O. 4 of 1842, the accused was charged with drunkenness on duty between Sept. 1st and Dec. 31st, 1840, and objected to the specification as including "such a length of time as to prevent the possibility of either disproving it or defending himself against it." His objection was sustained by the court, and the charge and specification were "accordingly thrown out." The proceedings were approved by the President.

[4] See instance in G. C. M. O. 10 of 1878. In the case of Brig. Gen. Hull, Printed Trial—Appendix, the time, as of a continuing offence, was set forth in the first charge, thus—"Treason against the United States between the ninth of April and the seventeenth of August, 1812." The third charge is similarly expressed. In the second charge the place, as well as the time, is set forth as follows—"Cowardice at and in the neighborhood of Detroit, between the first day of July and the seventeenth day of August, 1812."

The *hour* of the day or night at which a certain alleged act took place need never be specified, unless part of the gist or essence of the transaction upon which the charge is based.[3] Thus, in a charge against a soldier for sleeping on his post as a sentinel, it will generally be desirable, as more accurate, to designate at what hour, or between what hours, he was found asleep, in order to identify the time with that of his regular turn of duty.[4]

Statement of Quality, Quantity, Number, Kind, Value, &c. Especially where a party is charged with the larceny, embezzlement, &c., of property, it is proper that the quality, quantity, number, kind, value, denomination, &c., of the moneys or articles stolen, appropriated, &c., should be specified sufficiently clearly to identify the same,[5] although the utmost exactness is not required.[6] The *value* of the property stolen is a particular held especially essential to be stated in an indictment for larceny; since "in order to make the stealing of any article larceny at the common law, it must be proven to be of some value."[7] In a military charge there is not the same necessity for accuracy in the statement of quantity, number, or amount, since the court in its Finding can always rectify the item according to the testimony. As to value, a specification which omitted to assign a value to an article alleged to have been the subject of larceny would not be held defective if the article were such as presumably to be of some value, at least to the owner. The value of stolen property is in fact frequently omitted to be stated in a military charge. It should be alleged, however, if only for the purpose of assisting the court in determining whether the accused, upon conviction, may, (in view of the law of the State, &c., as to the punishment,) be sentenced to imprisonment in a penitentiary under Art. 97 of the code.

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[1] DIGEST, 231; G. O. 64, Middle Dept., 1863, Do. 57, First Mil. Dist., 1867.

[2] See G. C. M. O. 42, Dept. of Texas, 1875, where, no date being given in the specification, and none appearing in the testimony, the proceedings were disapproved.

[3] "It is not necessary to mention the hour in the indictment; except, perhaps, in cases of *burglary*, where it is usually laid for the purpose of showing with more certainty that the offence was committed in the night-time and not during the twilight." 2 Gabbett, 222.

[4] See Simmons § 394.

[5] Stephen, 296; Starkie, 218; 1 Chitty, C. L., 235; 2 Gabbett, 232; Wharton, C. P. & P. § 206; 1 Bishop, C. P. § 576.

[6] See under the rule as to Certainty, *ante*, that only such particularity is required as the nature of the subject reasonably admits of.

[7] State *v.* Tillery, 1 N. & McC., 11. "It is necessary that some specific value should be assigned to whatever articles are charged as the subjects of larceny. An indictment cannot be sustained for stealing a thing of no intrinsic or artificial value." Wharton, C. P. & P. § 213. The *ownership* of property or money stolen or embezzled should also be set forth. 1 Bishop, C. P. § 581, 582, &c. Where the name of the owner is unknown and cannot be ascertained, he may be referred to as a "person unknown."

Statement of Writings. A writing may, ordinarily, be set out *verbatim* or in substance only. But where its terms enter into the very gist of the offence, as in the case of an instrument alleged to have been falsified or forged, a precise copy should be inserted if practicable.[1] So, in all cases where, although it may not be necessary to give it, a copy is professed to be exhibited, it should of course be a copy, *i. e.*, in the exact words of the original.[2] If a writing essential or desirable to be set forth literally has been lost or destroyed, or is in the possession of the accused, the fact will properly be averred by way of explanation of its non-statement, and its substance be given as nearly as practicable.[1] So, where its contents are indecent and improper to be recited, this should be explained, the substance and effect of the paper being at the same time presented. A writing, of which the original is expressed in a foreign language, should in general be given in English, with an averment to the effect that the version is a translation.[2] When the substance or purport only of a writing is stated, its terms should be expressed according to their legal effect; that is to say as they operate or take effect in law.[3] In military charges, where the writing is of a brief and simple character—as in the case of a general or special order alleged to have been disobeyed by the accused, or an official communication alleged to be disrespectful, &c.—it is preferable to recite it in full. Where the writing is more elaborate, or contains an extended array of figures or other details, its substance or material portion only will preferably be set out.[4] The original or a copy may however be appended to the Charge, a reference to the same as thereto annexed and forming part of the Charge being made in the specification;[5] this arrangement however is rare in the military practice.

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[1] Wharton, C. P. & P. § 167; 2 Bishop, C. P. § 403. "Where part only of the written instrument is included in the offence, that part alone is necessary to be set out." De Hart, 293. "In stating a libel or perjury, it is necessary only to set forth so much of the matter as renders the offence complete, provided the part omitted does not in any way alter the sense of that which is set out." 1 Chitty, C. L., 235. In an indictment for perjury it is only essential to set forth the substance of the oath, or that portion in regard to which the perjury is alleged to have been committed. People *v.* Warner, 5 Wend., 271; Campbell *v.* People, 8 Id., 638.

[2] A copy in pleading is usually introduced by some such expression as—"in these words;" "as follows, viz;" "in the words and figures following, to wit;" "of which the following is a copy;" or, more technically, "in tenor following;"—the term *tenor* being employed in pleading to indicate a transcript of the original instrument, in contradistinction to *substance* or *purport*. When the substance only of the writing is to be set out, the ordinary introduction is—"in substance as follows, viz;" "to the effect," (or "purport,") "following, namely, that," &c. See 1 Chitty, C. L., 233; 2 Gabbett, 201; Wharton, C. P. &. P. § 168–170; 1 Bishop, C. P. § 559–561, and cases cited. "*Marks of quotation* used in an indictment for libel, to distinguish the libellous matter, are not sufficient, *per se*, to indicate that the words thus designated are the very words of the alleged libel." Com. *v.* Wright, 1 Cush., 64.

Statement of Words Spoken. The authorities are quite strict in holding that spoken words, (where not too indecent, in which case their substance may be given,[6]) should be literally set forth in an indictment, when their character and effect—as that they are defamatory, scandalous, blasphemous, &c.—is the gist of the accusation.[1] Similarly in a military charge such words should be recited as uttered, or as nearly so as practicable. Thus a specification to a Charge under Art. 19, or Art. 20, which averred merely that the accused used disrespectful language against the President, or toward his commanding officer, without stating the words or at least their substance, would be defective, and the court, upon exception taken, would properly require it to be amended.

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[1] Wharton, C. P. & P. § 176.

[2] See 1 Chitty, C. L., 175, where is stated the general rule that indictments, which were at an early period written in Latin, "must be in English." Hale, (2 P. C., 169,) writing about the middle of the seventeenth century, says:—"Regularly every indictment ought to be in Latin, as all pleadings in the courts of law ought to be; and it is of excellent use because, it being a fixed regular language, it is not capable of so many changes and alterations as happen in vulgar languages." In Rex *v.* Goldstein, R. & R., C. C., 473, an indictment for the forgery of a Prussian treasury note, not containing a translation of the same, was held defective.

[3] Stephen, 389; U. S. *v.* Keen, 1 McLean, 441.

[4] Thus, in charging the offence of procuring a double payment, the pay account need not be set forth in full, though this has sometimes been done.

[5] Com. *v.* Tarbox, 1 Cush., 72.

[6] See Bombay R., 2, 3; also instances in G. O. 6, Dept. of Utah, 1861; Do. 32, Div. Atlantic, 1878.

Statement of Statutory Offences. In setting forth in an indictment an act made an offence by statute, the *strict* rule requires that the words of the description should be closely followed;[2] and it is always *sufficient*,[3] and safest, to so follow them. It has been held, however, in some of the U. S. courts, that the *exact* language of the statute need not be employed, provided the description be adopted with a substantial accuracy.[4]

As all military offences are statutory offences, this rule, (with its qualification,) applies directly to military charges; but the Articles of war, under which nearly all such charges are laid, are so brief, and so simple in their terms, that there is in general no difficulty in framing allegations to meet their provisions. The only two points ruled upon by the authorities in this connection which need be noted here are, (1) that when the Article or other statute specifies an exception or exceptions to its general operation, it will in general be proper to negative the same in describing the offence in the specification;[1] and, (2) that where the Article or other statute enumerates two or more similar forms of offence or phases of the same offence in a disjunctive form, they should, (if averred together,) be averred conjunctively;[2] or, in other words, where criminal acts, which may be imputed in the same count or Charge without duplicity, are stated in the disjunctive in the statute, they should, if pleaded together, be expressed in the conjunctive form.[3] This point will be further illustrated in treating of "double" pleading.

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[1] 2 Hawkins, c. 25, s. 59; 2 Gabbett, 232; Wharton, C. P. & P. § 203. In Rex *v.* How, Strange, 699, it was held that it was not sufficient to allege that the defendant used scandalous, threatening and contemptuous words against a magistrate, but that the words themselves must be set out. In Rex *v.* Popplewell, Id., 686, the report is —"Conviction for profane cursing and swearing was quashed for want of the particular oaths and curses being set out."

[2] 1 Chitty, C. L., 281; 2 Gabbett, 239; Wharton, C. P. & P. § 220; 1 Bishop, C. P., Ch. XXXIX. "Where the words of the statute are descriptive of the nature of the offence, the indictment must follow the very words, and expressly charge the offence upon the defendant." State *v.* Gibbons, 1 South., 51. "It is a general rule that all indictments upon statutes, *especially the most penal*, must state all the circumstances which constitute the definition of the offence in the Act, so as to bring the defendant precisely within it." State *v.* Foster, 3 McC., 444. "If a part of the description of the offence consists of a negative proposition, it is as necessary in an indictment for that offence to state the negative as the affirmative part of the description." U. S. *v.* McCormick, 1 Cranch, C. C., 598.

[3] U. S. *v.* Armstrong, 5 Philad., 277; People *v.* Taylor, 3 Denio, 93. And see U. S. *v.* Mills, 7 Peters, 142; State *v.* Abbott, 11 Foster, 434.

[4] See U. S. *v.* Bachelder, 2 Gallison, 18; Do. *v.* Deming, 4 McLean, 3. Hawkins, (vol. 2, c. 25, s. 100,) mentions, as a good reason for not requiring the highest exactness in the statement of statutory offences, that—"the judges are bound *ex officio* to take notice of all public statutes." And see 1 Bishop, C. P. § 608.

Statement of Intent. It is laid down, generally, by

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[1] "If there be any exception contained in the same clause of the statute which creates the offence, the indictment must show negatively that the defendant, or the subject of the indictment, does not come within the exception. If the exception or proviso be in a subsequent clause or statute, or although in the same section, yet if it be not incorporated with the enacting clause by any words of reference, it is, in that case, matter of defence for the other party, and need not be negatived in the pleading." Monthly Law Reporter, 6 N. S., 77. And see U. S. *v.* Pond, 2 Curtis, 85; Com. *v.* Maxwell, 1 Pick., 141; 1 Ben. & Heard, L. C. C., 250, notes.

[2] Stephen, 386; 2 Gabbett, 200; Gould, 55, note; Wharton, C. P. & P., § 161, 162; 1 Bishop, C. P., § 585, 586; Rex *v*, Stocker, 1 Salk., 342; Rex *v.* Middlehurst, 1 Burr, 399; U. S. *v.* Almeida, Whart. Prec., 1061, note; State *v.* Morton, 27 Verm., 310; State *v.* Price, 6 Halst., 203; Rasnick *v.* Com., 2 Va. Cas., 356; Kirby *v.* State, 1 Ohio St., 185. "Where a statute, defining crimes and prescribing their punishment, describes disjunctively under a single head certain offences which are of such a character that a single transaction may include the commission of one or of more than one of them, a count of an indictment charging them conjunctively may be sustained by proof of the commission of only one of them." U. S. *v.* Armstrong, 5 Philad., 273.

[3] The 60th Article of war is the most conspicuous *military* statute of the class indicated.

But distinct offences, made punishable by the same article, should not be charged in an *alternative* form, but separately. See SEVENTEENTH ARTICLE—Chapter XXV.

Chitty,[1] that—"where an evil intent accompanying an act is necessary to constitute such act a crime, the intent must be alleged in the indictment." But in military cases the intent of an act need not be added to the statement of its commission, unless required to be by the terms of the statute on the subject, or, in other words, unless the Article or other statute creating and describing the offence makes the intent, in terms, an element of the criminal act.[2] Thus Arts. 3, 5, 8, 14, 15, 16, 27, 45, 50 and 59 declare that if officer or soldier, as the case may be, "knowingly," or "wilfully," or "knowingly and wilfully," commit a certain act, he shall be amenable to trial and punishment. So, in Art. 60, the terms "knowing," "knowingly," "knowingly and wilfully," "wrongfully and knowingly," and "with intent to defraud," are employed as indicating the purpose with which the different acts denounced must be committed to constitute them offences within the law. In all these instances the *intent* should properly be expressly averred in the Charge, and in the word or words in which it is designated in the statute. On the other hand, in cases of crimes which in their very nature involve a malicious or wrongful intent, as those of manslaughter, robbery, larceny, rape, perjury, &c., specified in Art. 58, or chargeable, (when directly prejudicing the service,) under Art. 62, while the common law form of indictment may be followed, it is allowable to charge the offence simply by its name, without employing in the specification words expressive of the intent, as "wilfully," "maliciously," "feloniously," or the like.

Different Statements of Same Offence. It is laid down by Chitty[3] that—"It is frequently advisable, when the crime is of a complicated nature, or it is uncertain whether the evidence will support the higher and more criminal part of the charge, or the charge precisely as laid, to insert two or more counts in the indictment." And Wharton[4] writes—"Every cautious pleader will insert as many counts as will be necessary to provide for every possible contingency in the evidence; and this the law permits." In military cases where the offence falls apparently equally within the purview of two or more articles of war, or where the legal character of the act of the accused cannot be precisely known or defined till developed by the proof, it is not unfrequent in cases of importance to state the accusation under two or more Charges[1]—as indicated later in this Chapter. If the two articles impose different penalties, it may, for this additional reason, be desirable to prefer separate charges, since the court will thus be invested with a wider discretion as to the punishment. Where, however, the case falls quite clearly within the definition of a certain specific article, to resort to plural charges is neither good pleading nor just to the accused. At most, in such cases, a single additional charge under Art. 62 should in general suffice. An unnecessary multiplication of forms of charge for the same offence is always to be avoided.[2] In view of the peculiar authority of a court-martial to make corrections and substitutions in its Finding, and to convict of a breach of discipline where the proof fails to establish the specific act alleged, the charging of the same offence under different forms is much less frequently called for in the military than in the civil practice.

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[1] C. L., 233.

[2] See Simmons § 407; De Hart, 295; G. O. 28 of 1859.

[3] 1 C. L., 248.

[4] C. P. & P. § 297. And see 1 Archbold, 93; Com. *v.* Webster, 5 Cush., 321.

Rule as to Duplicity. An indictment or count in which two or more separate and distinct offences, whether of the same or a different nature, are set forth together, is said to be *double*, and such a pleading is bad on account of *duplicity*.[3]

This rule, however, does not apply to the stating together, in the same count, of several distinct criminal acts, provided the same all form parts of the same transaction, and substantially complete a single occasion of offence. Thus it has been held that assault and battery and false imprisonment, when committed together or in immediate sequence, may be laid in the same count without duplicity, since "collectively they constitute but one offence."[1] So it is held not double pleading to allege in the same count the larceny of several distinct articles appropriated at the same time and place.[2]

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[1] "The commander who prefers a charge may, in the exercise of a just and legal discretion, when the act may fall under different articles of war, elect under which to charge it, or may charge it variously as in the several counts of an indictment." G. O. 18 of 1859.

[2] See G. O. 19, Dept. of the Columbia, 1872; G. C. M. O. 95, Div. Pacific & Dept. of Cal., 1881.

[3] 1 Chitty, C. L., 253; Starkie, 271; 1 Archbold, 95; Stephen, 251, 262; 2 Gabbett, 201, 234; Gould, 389; Wharton, C. P. & P. § 243; 1 Bishop, C. P., Ch. XXVIII; also Hough, (Practice,) 40; Simmons § 401; Griffiths, 61; De Hart, 298; DIGEST, 229.

A further description of cases is to be noted as not within the rule, or as constituting an exception to the rule,—*viz.*, cases of *statutory* offences or phases of offence of the same nature, classified in the enactment as of the same species and made similarly punishable. In a case of this class it was observed by a U. S. court[3] that the several criminal acts indicated may be regarded as "representing each a stage in the same offence, and therefore properly to be coupled in one count."[4]

So, in military law, the similar acts specified in the separate paragraphs of Art. 60 may, in general, be joined in the same Charge without incurring the fault of duplicity. Thus it may be alleged that the accused did make and cause to be made, and present and cause to be presented, for payment, a claim, &c., knowing the same to be fraudulent, &c.; or did embezzle, and knowingly and wilfully misappropriate and apply to his own use, property of the United States, &c.[5]

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[1] Francisco *v.* State, 4 Zabr., 30.

[2] State *v.* Williams, 10 Humph., 101; Lorton *v.* State, 7 Mo., 55; Wharton, C. P. & P. § 252. And see case in DIGEST, 229–30.

[3] U. S. *v.* Sander, 6 McLean, 600.

[4] In this case which arose under a statute of March 3, 1825, which provided that any person who should "secrete, embezzle, or destroy a mail of letters," should be subject to a certain punishment, it was held that a count, alleging that the defendant "did secrete and embezzle" a mail, was not bad for duplicity. And see U. S. *v.* Mills, 7 Peters, 142; U. S. *v.* Bachelder, 2 Gallison, 15. In the further case of U. S. *v.* Armstrong, 5 Philad., 273, it was held that a count was good and not double which charged the defendant with "transmitting to and presenting at, and causing and procuring to be transmitted to and presented at, the office of the Commissioner of Pensions a forged writing, for the fraudulent purpose of obtaining a soldier's bounty land, though the only act of the defendant was putting the forged letter with the guilty purpose into the post office at Philadelphia, directed to the Commissioner of Pensions at Washington." See the similar ruling in the late case of U. S. *v.* Hull, 4 McCrary, 274, (and 14 Fed., 324,) and compare State *v.* Haney, 2 Dev. & Bat., 403; Rasnick *v.* Com., 2 Va. Cas., 356; State *v.* Morton, 27 Vt., 310; Clifford *v.* State, 29 Wis., 327; Mackey *v.* State, 3 Ohio St., 362; Starkie, 246; 1 Bishop, C. P. § 586 and cases cited.

[5] But the *stealing* made punishable in the same clause would not properly be charged conjunctively, (or disjunctively,) with *embezzlement* the two being distinct offences in law.

The point under consideration is illustrative of the rule of pleading statutory offences heretofore considered, that, where acts which may be charged together without duplicity are expressed in the statute disjunctively, they should, when averred together, be expressed conjunctively.

But notwithstanding the form of statement thus sanctioned, the careful military pleader will always preferably set forth *by itself* the form of the offence of the accused *where it can be clearly distinguished*, instead of coupling or blending it with another form in the same specification. Thus, if it is clear that the accused *personally* presented the claim alleged to be fraudulent, he will properly and preferably be charged simply with presenting, and not with presenting and causing to be presented. If it is doubtful whether the claim was presented personally or through another person, the offence may well be pleaded conjunctively according to the forms above cited.

It may be added that *double pleading*, consisting sometimes in joining two or more separate and distinct instances of the same offence, but more frequently in blending *different specific offences, in one specification*, has been a not uncommon fault in our service, and has been repeatedly condemned in Orders.[1]

It remains also to notice, under this head, the two minor points indicated by the authorities—that mere surplusage or immaterial matter cannot avail to make a pleading double;[2] while, on the other hand, matter which is material may have such effect though it be defectively pleaded.[3]

Joinder. Although a count of an indictment may not regularly charge more than one distinct and separate offence, it may, in a proper case, charge that offence against several defendants as having been committed by them conjointly. As it is laid down by the authorities,—"When more than one join in the commission of an offence, all, or any number of them, may be jointly indicted for it, or each of them may be indicted separately."[1] * * * "There are some offences in which the agency of two or more is essential," and in an indictment for which "less than two cannot possibly be joined," as conspiracy and riot.[2] But whenever the offence is, in its nature, *several*, there can be no joinder.[3]

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[1] See G. O. 3, 83, Dept. of the Mo., 1863; Do., 49, Dept. of the Ohio, 1864; Do. 9, Dept. of the Gulf, 1866; G. C. M. O. 80 of 1875; Do. 8, Dept. of Texas, 1873. The instances of this fault appear to have been more frequent and marked in the English service. See, for example, the cases, in James' Collection, of Cornet Ashburnham, p. 113; Lieut. Duckett, p. 219; Ast. Surgeon Martin, p. 364; Ensign Gunter, p. 487, &c.

[2] Stephen, 259; Gould, 142; 1 Bishop, C. P. § 440; State *v.* Palmer, 35 Maine, 9; Green *v.* State, 23 Miss., 509.

[3] Stephen, 261. And see Gould, 142.

The joining of several persons in one Charge, though not unfrequent during the late war,[4] is not now common in the military practice, but may always be resorted to where a single act of offence has been committed by two or more soldiers or officers in concert and in pursuance of a common intent.[5] The Charge of

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[1] Starkie, 34; 1 Chitty, C. L., 255; 1 Archbold, 96; 2 Gabbett, 251; Wharton, C. P. & P. § 301; 1 Bishop, C. P., Ch. XXIX.

[2] See Wharton, C. P. & P. § 305, 306; U. S. *v.* Cole, 5 McLean, 523; Com. *v.* Manson, 2 Ashm., 31; State *v.* Tom, 2 Dev., 574.

[3] Starkie, 42; Wharton, C. P. & P. § 302. Thus two or more cannot be joined in an indictment for perjury. 2 Hawkins, c. 25, s. 89, note 1; Rex *v.* Phillips, Strange, 921. "Or for seditious or blasphemous words, or the like, because such offences are in themselves several." 2 Hale, 174, note 11. "Where the offence indicted doth not wholly arise from the joint act of all the defendants, but from such act joined with some personal and particular defect or omission of each defendant, without which it would be no offence, * * * the indictment must charge them severally and not jointly." 2 Hawkins, c. 25, s. 89. And see 2 Gabbett, 252. In U. S. *v.* Kazinski, 2 Sprague, 7, four parties were jointly indicted for "enlisting and entering" themselves as soldiers in the service of a foreign power, in violation of the neutrality act of 1818. It was held by Sprague, J., that this was an offence "in which but one could have participated;" adding—"No one could be guilty of the offence of another person's enlisting himself, which was the offence in these counts charged. Each of these counts charged four persons jointly with an offence which by law is several only, and can under no circumstances be joint. These counts must be stricken out."

[4] Among the most conspicuous instances were cases in the following Orders, where the number of the accused as joined in the charges and trials were as follows:—Eighteen in G. C. M. O. 6, Dept. of Ky., 1866; Twenty-one in G. C. M. O. 62, Dept. of Texas, 1873; Twenty-three in G. O. 175, Fifth Mil. Dist., 1869; Thirty-two in G. O. 38, Dept. of the Platte, 1867; Thirty-four in G. C. M. O. 521, War Dept., 1865.

[5] DIGEST, 232; Kennedy, 73–74; Hough, (Practice,) 42; Simmons § 402; G. O. 78 of 1872. And see G. O. 10, Dept. of the Platte, 1871, where two soldiers were held properly joined in a Charge for an absence without leave committed together by previous deliberate concert, also Do. 26, Id., 1871, where was approved a Charge in which

"joining in a mutiny"—an offence made punishable by Art. 22 of the code—is that which presents the most frequent examples of joinder at military law. But the mere fact that several persons happen to have committed the same offence at the same time does not authorize their being joined in the Charge.[1] Thus where two or more soldiers take occasion to desert, or absent themselves without leave, in company, but not in pursuance of a common unlawful design and concert, the case is not one of a single joint offence, but of several separate offences of the same character, which are no less *several in law* though committed at the same moment.[2]

Whether in a case in which there may properly be a joinder, the accused shall be charged and tried jointly or separately, is a question of discretion, to be determined upon considerations of convenience and expediency, and in view of the exigencies of the service, by the commander authorized to order the court. The mere fact that different measures of punishment will properly require to be awarded to the different parties, on conviction, can constitute no objection to their being jointly prosecuted.[3]

Under what circumstances and in what manner accused persons jointly charged may procure themselves to be *severed* on the trial, will be indicated in a subsequent chapter.[4]

III. RULES OF MILITARY LAW IN REGARD TO THE FRAMING OF THE CHARGE.

As to the Wording of the Charge.—***Approved forms.*** Every military Charge must be predicated upon a violation of an existing Article of war or other statute[5] of the United States, and

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were joined three soldiers who had conspired to overthrow the guard and escape together from the guard-house, and succeeded.

Par. 1016, A. R. prescribes—"Prisoners will not be joined in the same charge, nor tried on joint charges, unless for concert of action in the same offence."

[1] DIGEST, 232–3.

[2] See DIGEST, 233; Simmons § 402; G. O. 78 of 1872; Do. 58, Dept. of the South, 1871; G. C. M. O. 42, Fourth Mil. Dist., 1868. But see also case of joint absence without leave cited in above note.

[3] See p. 559, *post.*

[4] See Chapter XVI.—"Motion to sever."

[5] A charge for a neglect to comply with an Army Regulation is a charge under Art. 62, a statute.

the mode in which the "*charge*," (as distinguished from the "*specification*,") shall be framed depends in the first place upon the nature of the enactment. The forms of such charge are indeed of two classes: those laid under Articles, (or other statutes,) designating *specific* offences; those laid under the two *general* Articles, or Articles providing for the punishment of offences under a general designation, *viz.*, the 61st and 62d. The charge, where specific, may consist simply of the name of the offence, as "Desertion," "Mutiny," "Misbehaviour before the enemy;" or, referring to the article under which it is brought, it may be expressed as "Violation of the —— Article of War,"[1] or it may combine the two forms and be phrased as "False Muster, in violation of the 14th Article of War," "Disobedience of Orders in violation of the 21st Article," &c.[2] Where the charge is laid under one of the *general* Articles, it may be worded—"Conduct unbecoming an officer and a gentleman," or "Conduct to the prejudice of good order and military discipline;" or it may be framed in this form with the addition of the words "in violation of the 61st or 62d Article of War;" or—though this mode is here more open to objection than where a *specific* offence is charged—it may be simply expressed as "Violation of the 61st or 62d Article," as the case may be.[3]

Objectionable forms. The above are the only recognized and regular forms of stating the charge; a charge not following one of such forms, if not fatally defective, must be at least more or less faulty. Thus those loose forms of charge, now much less frequent than formerly, such as "Worthlessness," "Incompetency," "Habitual Drunkenness," "Unreliability," "General Bad Conduct," and the like, inasmuch as they do not designate any specific military offence recognized by the code, while at the same time applying to the accused a depreciatory and unfair description in advance of trial, are highly objectionable, and have been repeatedly disapproved in Orders.[1] Where indeed the specifications to such charges merely set forth, (as they generally have done,) former instances of arrests or confinements in the guard-house, or former trials and convictions for slight offences, the pleading is wholly insufficient, "such instances not constituting military offences, but merely the punishments or consequences of such offences."[2] So is the Charge insufficient, where the specification sets forth an habitual course of conduct, since the law provides for the trial and punishment not of bad habits but of specific acts of offence.[3] Such Charges indeed, where the specifications allege actual and distinct military disorders or neglects, may be supported, under a principle hereafter to be noticed, as Charges under the 62d Article. In such cases, however, they should properly be formally laid under that Article, as "Conduct to the prejudice of good order and military discipline," with a *separate specification* for each act of misconduct.[4]

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[1] This form has occasionally been criticized as improper or unsatisfactory, (see G. O. 11 of 1862; Do. 32, Army of the Potomac, 1862; Do. 2, Dept. of the East, 1863; Do. 121, Dept. of the Mo., 1863; Do. 21, Dept. of the Columbia, 1885; O'Brien, 233,) but it is sanctioned by the usage of the service, and is not open to *legal* objection. DIGEST, 225. In *Ex parte* Mason, (105 U. S., 696,) the Supreme Court did not comment upon the charge—"Violation of the 62d Article of War," as unusual or calling for remark.

[2] The Charges, as given in the Appendix, are generally in this form.

[3] In the practice of the *Navy*, more extended forms of charges, such as the following, have been not unfrequent—"Violation of the Twentieth Clause of the Eighth Article of the Articles for the Government of the Navy;" "Culpable inefficiency in the performance of duty in violation of the —— clause of the —— Article," &c.; "Violation of par. 16, page 76, of the Regulations for the Government of the Navy of the United States."

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[1] G. O. 11 of 1873; Do. 171, Dept. of the South, 1864; Do. 19, Id., 1867; Do. 9, Dept. of the Gulf, 1866; Do. 16, Dept. of the Tenn., 1867; Do. 85, Dept. of the Cumberland, 1867; Do. 21, Dept. of the Mo., 1863; G. C. M. O. 33, Id., 1874; Do. 35, Dept. of the Platte, 1872.

The objectionable form—"Chronic Alcoholism, to the prejudice," &c., occurs in a late G. C. M. O.—No. 4, Dept. of the Platte, 1894, but is not remarked upon.

[2] DIGEST, 227. And see G. O. 11 of 1873; Do. 32, Dept. of the Platte, 1870. To try upon such a charge would often indeed involve a violation of the 102d Article, prohibiting a second trial for the same offence. See DIGEST, 228; G. O. 37, Dept. of Florida, 1866; Do. 69, Dept. of the South, 1870. This class of Charges are frequently subject to the objection of being *double*. For example, in G. O. 26, Dept. of the Columbia, 1870, are published two cases, in which a specification to a charge of "Habitual Drunkenness, to the prejudice," &c., alleges that the accused was drunk, in one of the cases on *nine*, and in the other on *eight* specified occasions, "and at various other times."

[3] G. O. 24, Dept. of Cal., 1865; Do. 43, Dept. of the Ohio, 1863; G. C. M. O. 8, Dept. of Texas, 1873.

[4] A form of specification which was growing into use before 1886, which, with an averment of a particular act of offence, embraced an enumeration of previous convictions, (or arrests and confinements,) of the accused for the same offence or other minor offences, has now been

A further, less faulty, but also improper and unmilitary form, is the use of intensives in connection with the title of the charge;—as "*Positive*, or *Deliberate*, disobedience of Orders," "*Gross* neglect of duty," "*Corrupt* or *Fraudulent* conduct, to the prejudice," &c. The expletive in such cases cannot heighten or affect the quality of the offence, and is wholly superfluous.[1] It is indeed commonly but an expression of the *animus* or estimate of the accuser; but a military charge is no proper medium for the expression of personal feeling or opinion. If the case be an aggravated one, the matter of aggravation, so far as properly descriptive of the alleged offence, may be set forth in the specification,[2] and so far as material to the question of guilt or of punishment, may be brought out in evidence.

Irregular but allowable forms under Art. 62. Cases have not been unfrequent in practice where the charge fails either to designate a specific military offence, or to state in an approved form an offence under Art. 62, but where *charge and specification taken together* do make out a statement of a crime, neglect, or disorder to the prejudice of good order and military discipline. In such cases, to prevent a failure or delay of justice, the pleading as a whole is supported as a legally sufficient statement of an offence under the 62d Article. In the same manner, where a specific offence is charged by name, but the specification does not state facts proper or sufficient to constitute such offence, but charge and specification together amount to an allegation of an offence included within the general description of Art. 62, legal effect may be given to the Charge as a whole by the court, which may proceed to try and *find* accordingly. This principle, which forcibly illustrates the liberality with which rules of pleading are applied in military cases, rests now upon established usage in our service.[3] It will be further illustrated in the Chapter on the Finding.

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superseded by the Army Regulation, par 1018, (amended by G. O. 64 of 1892,) authorizing the introduction in evidence of *previous convictions* between finding and sentence. See *post*, Chapter XIX.

[1] See G. O. 11 of 1873, concurring with previous opinions of the Judge Advocate General; also G. O. 21, Dept. of the Mo., 1863; G. C. M. O. 33, Id., 1874.

[2] See the similar case of stigmatizing words added to the charge of "conduct unbecoming an officer and gentleman," in G. C. M. O. 80 of 1875.

[3] See DIGEST, 226.

The Heading No Part of the Charge. The heading or caption by which military charges are commonly prefaced, *viz.*:—"Charges and specifications preferred against A. B.," adding his rank, office, corps, &c., is no part of the Charge or Charges, and may be omitted altogether. The point is one which would scarcely require to be noticed except for the reason that it has been expressly affirmed by Atty. Gen. Gilpin in a specific case, where an erroneous rank attributed to the accused in the heading was (of course) held not to have affected the validity of the Charge.[1]

In this case, it may be added, the *specification* referred to the accused as "the said" A. B. This was irregular: no reference should be made to the heading, but the designation in the specification should be entire and complete within itself, and contain a full description of the accused independently of the heading, even if it but repeats its wording. The heading is even less a part of a Charge than is the "caption" of an indictment.[2]

The Charge to be Laid under the Proper Article. An offence made specifically punishable by a certain Article must of course be formally charged thereunder: to charge it instead as a violation of an Article relating to a different specific offence, or of the general—62d—Article, will be a serious defect, for which the Charge will properly be struck out on motion of the accused.[3] The effect of a failure to observe this rule is specially illustrated in a case where the Article under which the Charge should have been laid, and that under which it has actually been laid, prescribe different *sentences*, as where the former requires a particular punishment to be imposed on conviction, and the latter leaves the punishment to the discretion of the court; or *vice versa.*[4] But though no such distinction may exist—the two Articles prescribing or permitting the same punishment, or both making the punishment discretionary—the error of the pleading is the same in law.

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[1] 3 Opins., 548.

[2] The caption of an indictment is no part of the indictment itself. 2 Gabbett, 278; Wharton, C. P. & P. § 91. It is "merely a preamble to the record." State *v.* Smith, 2 Harr., 532.

[3] DIGEST, 225. And see the charging of specific offences under Art. 62 condemned in G. O. 5, Northern Dept., 1865; Do. 25, Dept. of the Platte, 1871; G. C. M. O. 32, Dept. of the Mo., 1871.

[4] See G. O. 18 of 1859; Do. 287, of 1863; Do. 54, Dept. of the Tenn., 1866.

Application of the rule illustrated—Charging same offence under more than one Article. There can be in general but little difficulty in determining under which Article a specific military offence is to be charged, since it will rarely happen that such an offence will be found to be included within the descriptions of two different articles. One instance of such an inclusion is that of the offence of stealing property of the United States, which, in time of *war*, may be charged under Art. 58 as well as under Art. 60; otherwise in time of *peace* when it may, properly, be charged only under the latter article. Another instance is that of the offence of selling or disposing of public property, which is made punishable, generally, by the 60th, and, in certain particular instances, by the 16th and 17th, of the Articles. But the difficulty here is but slight, for where the offence clearly falls within one of these instances, it will properly be charged under the particular article; otherwise under Art. 60. Further, where an officer has committed a specific military offence so dishonorable in its circumstances as also to constitute "conduct unbecoming an officer and a gentleman," he is amenable to trial for the same act under two articles; but here again there is no difficulty, since the offence may be charged under both—the specific article and the 61st.

The principal difficulty in observing the present rule will arise in a case where it is *doubtful* whether the offence is one of a class contemplated by a certain specific article, and therefore properly chargeable under it, or is not within the terms of such article and chargeable only under Art. 62. Thus there may sometimes be a reasonable question whether the making of a false return should be charged under Art. 8 or Art. 62; or a disobedience of an order under Art. 21 or Art. 62; or a mutinous act under Art. 22 or Art. 62; or a case of drunkenness under Art. 38 or Art. 62; or a breach of arrest under Art. 65 or Art. 62. But study and deliberation will commonly solve such questions; and where a serious doubt still remains, the difficulty may be in part avoided by charging the act both as a violation of the specific article and as "conduct to the prejudice of good order and military discipline." Where indeed the offence is *clearly* one cognizable under an Article relating to a distinct offence, to charge it also under the general—62d—Article will be superfluous. Where this is done, however, the court may properly entertain both charges for the purposes of the trial, unless indeed the specific article makes the offence a *capital* one. In that case, as a capital offence cannot be charged under Art. 62, the court will properly grant a motion to strike out the charge laid under this article, as not being within its jurisdiction.[1]

The Specification should be Appropriate to and Support the Charge. To complete a valid Charge, not only should the *charge* designate the real offence committed, but the *specification* should set forth the legal constituents of such offence, as defined by the statute or by the usage and precedents of the service. It should, by its statement, cover every item of such definition, so as not only to be appropriate to the distinctive charge but inappropriate to any other—except, perhaps, (in a case of an officer,) a charge under Art. 61.

Should state facts. Further the specification, to support the charge, should properly set forth *facts*—acts of commission or omission—and not mere inferences or conclusions of law. These, as we have already seen, have no proper place either in an Indictment or a Charge. In a military case, therefore, it is in general defective pleading to allege in the specification merely that the accused did commit the offence indicated in the charge, —as that he did behave himself with disrespect toward his commanding officer, did disobey the order of a superior officer, or did offer violence against such officer, did join in a mutiny, did misbehave before the enemy, did commit waste or spoil of private property, &c.;—the *proper* form being to set forth the specific facts and circumstances relied upon as constituting the particular offence charged.[2] In view, however, of the simplicity and directness of the provisions of the military code, a strict observance of this rule is not called for in some instances. Thus it is generally sufficient to allege in a specification to a charge under Art. 47 that the accused *did desert;* and so under Art. 38, that he was *found drunk*, &c.; without specifying in what the desertion or drunkenness consisted or by what acts it was indicated. But, except in such familiar cases, to describe the offence in the specification merely in the words by which it is designated in the charge, or in the Article, is bad pleading; and, where the description is thus bald, the court, upon the motion of the accused, may properly require the specification to be made more definite or be stricken out.

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[1] Such was the action taken in the case of Lieut. Rogers, where to a Charge for Disobedience of Orders under the 9th (now 21st) Article, and clearly properly so laid, was added a Charge for the same act laid under the 99th (now 62) Article. The latter, being objected to by the accused, was stricken out by the court, and the proceedings were approved by the Secretary of War. G. O. 13 of 1848.

[2] DIGEST, 225; G. O. 37, Army of the Potomac, 1861. See case of Pvt. Macnamara, (Simmons § 413,) where a Charge which merely named the offence without specifying the facts in which it consisted, was held insufficient as being so defective that a sentence could not be predicated thereon.

Should describe the complete offence. Lastly, the specification, in its statement of facts, should set forth such facts as will be sufficient, if proved, to sustain, not only the specific charge in contradistinction to any other, but also such charge in its entirety. A specification stating facts which will establish only a portion of the offence charged, or a secondary or incidental offence, will be as insufficient in law as if it stated facts representing an offence of a totally different nature.[1] A familiar instance of a specification not sustaining in its entirety the charge, would be one in which, the charge being desertion, the specification alleged an absence without leave only; or one where under a charge of "robbery" the specification described a larceny only, the averment as to the use of force, &c., being omitted. The fact that the court may *find* guilty of a lesser offence will not excuse the pleader from the observance of this rule.

Each of several specifications to be complete and independent. It should be noticed that where there are several specifications, the present rule is to be applied to the framing of each specification precisely as if it were the only specification in the case. While one good specification will sustain the charge, any number of defective specifications will fail to do so. Each specification, therefore, should be entire and sufficient *per se.* Independently of every other specification, and without borrowing from, or referring to, any other, each separate specification should contain all the allegations, substantial and formal, which are necessary and proper both to complete itself and to support the charge as laid.[1]

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[1] Compare instance, (in a naval case,) of a specification held not to have supported the charge, in 9 Opins., At. Gen., 223.

IV. THE PREFERRING OF CHARGES.

Preliminary Investigation — Charges to be well-founded. Only such charges as, upon sufficient investigation, are ascertained to be supported by the facts—are found to be sustained by at least *prima facie* evidence—should be preferred for trial. The preferring of charges, without a proper investigation of the facts in the first instance—a neglect of duty which may entail, besides a needless waste of time spent in the trial, the arrest and confinement of an innocent person—has been repeatedly severely reflected upon in General Orders.[2] In the British military law, such investigation is enjoined by express statute.[3] A charge indeed should not be preferred at all where the case is susceptible of being properly disposed of, without trial, by the commanding officer.[4]

Charges not to be Frivolous or Malicious. All charges should be substantial and made in good faith. Where, as the result of imperfect investigation or otherwise, frivolous charges are preferred, or where the charges are actuated by a hostile *animus* and are not in themselves well-founded, they are not a proper basis for a trial by court-martial. When such charges have been tried, they have not unfrequently exposed those preferring them to grave censure and in some cases to severe punishment.[1]

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[1] See G. O. 12, 33, Dept. of the Mo., 1862; Do. 15, Id., 1863. In the first of these Orders, the fact that the pleader had inserted a general statement of time and place at the end of all the specifications, as applicable to all alike, instead of a separate statement at the end of each, was condemned by the reviewing authority as a marked irregularity.

[2] See G. C. M. O. 70, 1875; G. O. 57, Dept. of the Tenn., 1864; Do. 50, 53, Dept. of the East, 1865; Do. 41, Id., 1868; Do. 10, 13, 17, Dept. of the Lakes, 1867; Do. 33, 38, Dept. of the Platte, 1868; Do. 33, Dept. of La., 1868; Do. 24, Fifth Mil. Dist., 1868; Do. 15, 153, Id., 1869; Do. 26, Dept. of the Mo., 1870; Do. 3, Id., 1872; Circ., Id., Nov. 15, 1871; G. O. 7, Dept. of the Gulf., 1872; Do. 11, Dept. of the Columbia, 1872; Do. 29, 71, Dept. of Dakota, 1873.

[3] "The charge made against every person taken into military custody shall, without unnecessary delay, be investigated by the proper military authority, and, as soon as may be, either proceedings shall be taken for punishing the offence, or such persons shall be discharged from custody." Army Act § 45, (5.) A court-martial should not investigate a vague or defective charge. Simmons § 457.

[4] Commanding officers, in forwarding charges, may well be, and have sometimes been, required in Orders to certify that they have fully investigated the case, and believe that the charge can be fully established. See the excellent G. O. 73 of 1892; also G. C. M. O. 7, Div. of Atlantic, 1887; Circ. No. 10, Dept. of Arizona, 1892.

To be Preferred against the Responsible Party. The charge in every case should be preferred only against the person responsible for the act. Where there is any doubt as to which of several persons is the one properly chargeable with the offence committed, they should not all be charged, if by a more complete investigation the guilty party can be distinguished.[2] Further, where superiors and inferiors have offended together, or superiors have sanctioned offences of subordinates,—whatever proceedings it may be thought proper to take against the latter, charges should certainly be preferred against the former, as primarily responsible and deserving punishment.[1] So, where duties have been improperly performed by soldiers, by reason of their having been assigned to the same when drunk or otherwise unfitted to perform them, by superiors cognizant of their condition, it is the latter who, as primarily responsible for the consequences, should become subject to charges rather than the former.[2]

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[1] See a recent case in G. C. M. O. 71 of 1879. In sundry cases reported by James, (see pp. 81–4, 241, 266, 340, 372, 538–9, 583, 604–5, 792,) the preferring of frivolous or baseless charges is severely animadverted upon by the reviewing authority, and in several instances the officers who preferred the same are summarily dismissed the service. In G. O. 86, Dept. of the Mo., 1867, Gen. Hancock observes:—"To prefer accusations which cannot be maintained is highly injurious to the service and reflects discredit upon those who prefer them; and if upon trial the charges are found to be groundless, the officer preferring them should be held accountable and be tried himself for preferring malicious charges." Frivolous charges relating to *personal* matters are condemned by Gen. Crook, in G. O. 2, Dept. of the Columbia, 1870, as follows: "It is to be regretted that the Department Commander should be called upon to convene a court-martial to settle differences of opinion and peccadilloes between officers, which, it seems to him, should be settled among themselves, and not only without trouble, but without their being published to the world." And see remarks of the same Commander, in G. C. M. O. 3, Dept. of Arizona, 1884, as to the impropriety of making personal difficulties between officers the subject of charges.

In G. O., Hdqrs., Totoway, Oct. 30, 1780, General Washington comments upon the charges in the case of Col. Thomas Proctor, of the Artillery, as "vexatious, groundless, and illiberal." He adds—"It is with pain that he has seen several instances, for some time past, in which personal pique has given birth to prosecutions as unjust as they were indelicate and improper."

[2] In certain cases, published in G. C. M. O. 120, Dept. of the East, 1870, where three soldiers were separately charged, tried and sentenced, for the same act as committed by each, the proceedings were all disapproved because it did not appear from the evidence which one was the actual offender and responsible party.

All Existing Grounds of Accusation to be Presented Together—Multiplication and Accumulation of Charges. While charges should be prepared and preferred with as little delay, after they have been investigated and determined to be well-founded, as may be reasonably practicable,[3] care should be taken that *all* the charges and specifications to which the party may be subject be preferred together. Unlike the ordinary criminal procedure, where but one indictment, setting forth (in one or more counts) a single offence or connected criminal transaction,[4] is in general brought to trial at one time, the military usage and procedure permit of an indefinite number of offences being charged and adjudicated together in one and the same proceeding.[5] And, with a view to the summary and final action so important in military cases,—wherever an officer or soldier has been apparently guilty of several or many offences, whether of a similar character or distinct in their nature, charges and specifications covering them all, should, if practicable, be preferred together and together brought to trial; separate *sets* of charges, where they exist, being consolidated.[6] Where all the charges to which a party is amenable are known or can readily be ascertained, and the testimony to establish them is available, to bring one or a portion to trial separately, and the other or remainder to a further trial later, is an irregular proceeding.[1]

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[1] Compare DIGEST, 379 § 3.

[2] See G. O. 2, Dept. of the Platte, 1873; G. C. M. O. 46, Dept. of Texas, 1880.

[3] Charges should not in general be preferred after the offence has been once passed over, and the accused has been released from arrest and restored to duty, and his misconduct has not been renewed. Surgeon Joliffe's Case, James, 516, Bombay R., 3.

[4] See Sec. 1024, Rev. Sts.

[5] In an old case, (1819,)—that of Col. Wm. King, 4th Infy., there were *thirty-one* specifications. Specifications setting forth distinct acts of offence were especially numerous in cases during the late war; amounting in one instance, published in G. O. 43, War Dept., 1863, to *sixty-one* in number.

[6] See DIGEST, 227.

What is known as the "*accumulation*" of Charges,—which is the allowing of separate slight offences to pass apparently unnoticed, until a sufficient number have been committed to make up together, when stated in separate specifications, a show of grave misconduct in the aggregate,—has been universally condemned, and the preferring of charges thus reserved has been commonly attributed to a hostile *animus*, to the serious disadvantage of the prosecution upon the trial.[2] Where indeed the dereliction of the party consists in the *habitual* nature of his misconduct—as that he is habitually addicted to becoming drunk—it may be proper to delay preferring the charge till instances sufficient to indicate the fact of habit have transpired; but such delay should not be unreasonably prolonged.[3]

By whom Charges are to be Preferred.[4] Preferring charges, in a general sense, consists in being the author of, or person responsible for, specific accusations presented against an officer or soldier. The "accuser," referred to in Art. 72, is, in this sense, the preferrer of the charges; and so is the "prosecutor" where he has either originated or adopted the accusation. In *law*, however, and as the term is employed in the present connection, the preferring of charges consists in the formal subscription and authentication of such charges for official purposes. A military charge, by whomever *initiated*, must—to serve as a proper basis for official action and trial—be *formally* preferred by a commissioned officer of the army. Such a charge may *originate* either with the formal preferrer himself, or with any other individual, whether or not in the military or public service. A civilian, if first advised or personally cognizant of a serious offence committed by an officer or soldier, may, as properly as any military person, bring the same to the knowledge of the military authorities, and indeed is but performing a public duty in so doing.[1] So, a charge may be advanced in the first instance by an enlisted man. But although a civilian or a soldier may present the charge in writing and duly framed, the *formal* preferment of the same—the legal act—must be by and under the signature of an *officer*.[2] A preferred charge is an official paper, and must be officially subscribed.

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[1] Such a proceeding is condemned in G. C. M. O. 37, Dept. of the Platte, 1872.

[2] "Delaying to bring forward charges" and "permitting them to lie dormant, justifies the impression that the prosecutor is not actuated by public motives alone in their institution." Simmons § 382. "It is highly improper to hold charges in reserve against an officer or soldier in order that they may accumulate so as to form collectively a crime of sufficient magnitude to justify a prosecution." Macomb, 26. And see Tytler, 162, 163; De Hart, 99; Harwood, 46; Ives, 88; 1 Opins. At. Gen., 295; G. C. M. O. 71 of 1879; G. O. 12, Dept. of the Mo., 1862; Do. 53, Dept. of Va. & No. Ca., 1863; Do. 41, Dept. of Washington, 1868; Do. 10, Dept. of the Platte, 1871; Do. 30, Dept. of the South, 1873; G. C. M. O. 2, Dept. of Texas, 1882; Do. 45, Div. Pacific & Dept. Cal., 1882; DIGEST, 226–7. In two cases reported by James, (pp. 203, 461,) the accuser, an inferior in rank, who had accumulated charges against his superior, the accused, was dismissed the service, in the Order publishing the proceedings. The rule of course does not apply where the offences, though long since committed, have recently all come at the same time to the knowledge of the officer preferring the charges. G. O. 33, Dept. of Arizona, 1871.

[3] See DIGEST, 226. In such case each *instance* should of course form the subject of a separate specification.

[4] Compare, under this head, DIGEST, 233–234.

Any officer, of whatever rank, and whether or not exercising command, may legally prefer a charge, and at any time. There is no military status which involves a legal disqualification to prefer a charge:[3] an officer, though himself under charges, in arrest, or under sentence, may not only originate but formally prefer charges with the same *legal* effect as any other officer. But while any officer may legally thus act, the preferring of charges by certain officers is not favored. Thus charges by a junior against a senior in rank, unless ordered to be preferred, or sanctioned, by a common superior, are not encouraged in practice,[1] though peculiar circumstances will sometimes justify them.[2] In general, charges will most appropriately be preferred either by the commanding officer of the accused, by a superior in rank, or by the judge advocate of the court,—the latter acting officially and by the direction express or implied of the convening authority. In any case an officer may be ordered by his proper commander, (or by the President, through the Secretary of War or a military representative,) to prefer charges against another officer or an enlisted man.[3]

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[1] That the validity of a charge is not affected by the fact that it *originated* with a civilian, see G. O. 33, Dept. of Arizona, 1871; also Gen. Swaim's Case, G. C. M. O. 19 of 1885.

[2] The peculiar practice of the preferring of charges against naval officers by the Secretary of the Navy has no counterpart in the military service. As to the objections to this practice, and its sanction by usage, see Trials of Com. Wilkes, pp. 2–3, and of Com. T. A. C. Jones, p. 367.

[3] In January, 1778, Lieut. Gen. Burgoyne, while a prisoner of war at Cambridge, Mass., preferred a charge against Col. David Henley, of the continental army, commanding at that place, which was entertained by Gen. Heath, (comdg. Eastern Department,) and a court-martial ordered by him thereon, at which Gen. Burgoyne acted as prosecutor. Heath's Memoirs, 149–156.

Authentication. A charge is officially authenticated and preferred by the formal subscription of the same by the preferring officer with his name, rank, regiment, corps, or office.[4] It is not *essential*, to give a court-martial *jurisdiction* of the offence or the offender, that the charges should be thus authenticated, or signed at all, provided they evidently emanate from an authorized source. Such court, however, might properly defer proceeding to trial, as might also the accused properly object to be arraigned and to plead, where the charges had been omitted to be subscribed in the usual manner.

To Whom to be Preferred. Charges are to be preferred to the commander authorized to order, or who would, under the circumstances, most appropriately order, the court. Such commander, (where trial by a general court-martial is proposed,) will be the Division, Department, or Army commander, (or in time of war a commander empowered by Art. 73,) the Superintendent of the Military Academy, or the President. By *preferring to* is meant officially addressing and forwarding to the commander, through the proper military channels, (or directly where permissible,) the formal charges; the same being usually accompanied with a request or recommendation, expressed in the letter of transmittal, that such charges, if approved, be referred to a court-martial for trial. Charges against enlisted men should now be accompanied by the statement, in regard to enlistments, discharges, &c., required by par. 1015, and by the evidence of previous convictions required by par. 1018, A. R.[1]

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[1] Such charges have been especially discouraged in the British service, where, in repeated cases, juniors who have preferred *and prosecuted* charges against their seniors have been severely rebuked, and not rarely, if commissioned officers, dismissed, or, if non-commissioned officers, reduced to the ranks. See James, pp. 35, 167, 203–4, 210, 266, 331, 372, 463, 539–40, 543, 583, 600–1, 648, 727, 759. In the review of one of these cases—Col. Quentin's—it is remarked by the Commander-in-chief: "A regard due to the subordination of the service must ever attach a severe responsibility to subordinate officers who become the accusers of their superiors."

[2] In Col. T. Chambers' case, (1826,) the charges, for drunkenness, &c., on which he was dismissed, were preferred by a captain of the regiment.

[3] This point was in substance held by Maj. Gen. Brown, as Gen. Comdg. the Army, in G. O. 3 of 1826.

[4] Signing charges as "by order" of a superior is not approved or customary in our practice, though the signing may have been ordered in fact. Otherwise in the British service. Simmons §

In the rare cases in which a commander authorized to order a general court-martial himself prefers directly the charges, he will properly prefer them to the court through the judge advocate; unless he be the "accuser or prosecutor" of the accused in the sense of Arts. 72 and 73, when he will prefer them to the President or the "next higher commander," as the case may be.

V. THE REFERRING OF CHARGES FOR TRIAL.

By Whom and How Referred. Regularly and properly charges can be referred to a general court-martial for trial only by the commander by whom the court has been convened, (or his successor in command,) or by his authority. The referring of charges to the court by the "highest authority on the spot"—as the post commander—has been sanctioned in some Orders, with special view to the trial of enlisted men.[2] But unless expressly authorized by the department, &c., commander,—as it sometimes has been where the court was assembled at a post or station remote from his headquarters,—such a reference by an inferior commander is irregular and improper.[3]

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[1] It has been observed that, in forwarding charges, to a department commander, the officer forwarding is not entitled to prejudice the accused by adding a statement that his character in the service is "bad," or to that effect. G. C. M. O. 41, Dept. of the Platte, 1893.

[2] In an Order of Gen. Scott, (G. O. 57, Hdqrs. of Army, May 20, 1857,) referred to and followed in a few subsequent Dept. G. O, the reference by the post commander is held authorized except where he is himself a member of the court. This however is not a correct statement of the law as now held and observed.

[3] DIGEST, 234; G. O. 67, Dept. of Ark., 1864; Do. 47, Dept. of the

The reference, by the department, &c., commander, of the charges to the court is not made till the same have been *approved* by him, and such approval is not given till the charges have been examined by the commander, with the assistance generally of the judge advocate or other proper staff officer attached to the command, and if necessary revised and corrected.

Upon their final approval, the charges are, regularly, transmitted from the headquarters to the judge advocate or president of the court—usually and preferably to the former—for prosecution and *trial*. Thus transmitted, they are not subject to the revision or criticism of the court or its members.[1]

VI. WITHDRAWAL OR AMENDMENT OF CHARGES AFTER REFERENCE FOR TRIAL.

The officer preferring charges is not entitled to have them brought to trial, nor has an accused a vested right in having charges against him adjudicated. The convening authority, representing the United States, may always withdraw charges before trial;[2] may cause or authorize a *nolle prosequi* to be entered as to a charge or specification after the charges have been placed before the court and even after arraignment, and may cause or authorize charges or specifications to be amended. But—so far as concerns the court and the parties—charges duly referred for trial are, in law, ordered to be tried as they stand. Thereafter to assume to amend them without proper authority is a military offence. As will appear in Chapter XVI, the court may strike out a charge or specification on motion of the accused if sufficient cause be exhibited; but, self-moved (or in the absence of an issue) and of its own original capacity, it has no power whatever to amend, modify, discard, or withdraw, or direct to be stricken out, any part of the charges or specifications officially

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East, 1868; Do. 88, Dept. of Dakota, 1869; Do. 2, Dept. of the Platte, 1873; Do. 8, Dept. of Texas, 1874. The irregularity would be *aggravated* where the post commander was himself a member of the court. See G. O. 68, Dept. of Dakota, 1875, where he was the president of the court, and it was held that his action had rendered him liable to challenge.

[1] G. C. M. O. 16, Dept. of Texas, 1893. And see Do. 210, Dept. of the East, 1884.

[2] Street *v.* U. S., 133 U. S., 305.

committed to it for trial,[1] except, indeed, in so far as to correct a mere obvious error of form.[2] How far the judge advocate may be empowered to amend, &c., will be considered in Chapter XIII. It need only be said here that he can have no authority for this purpose *virtute officii*, but must be thereto authorized—if authorized at all—by the superior by whom he has been detailed.

It may be added that where a command is furnished with a competent officer of the Judge Advocate General's Department, or staff officer acting as such, all charges will have been fully revised before being referred for trial. There will thus rarely be occasion for any considerable amendments at a later stage.

VII. ADDITIONAL CHARGES.

This is a technical term in military law, meaning new Charges which are advanced *after* the preferment and service of the particular Charge or set of Charges for the trial of which the court has been ordered, or upon which the accused was originally intended to be arraigned.[3] Such Charges may relate to past transactions which were not known by or brought to the attention of the officer framing or ordering the original Charges, at the time these were preferred; or they may, as is more frequent, arise from acts of the accused subsequent to his arrest on the original Charges. Thus if, after such arrest, he commits a "breach of arrest," an "additional" charge will properly be added in the case, and served upon him. Charges of this class do not require a separate trial, but may and properly should be tried by the same court which tries the original Charges, and at the same time. They must, however, be brought before the court prior to its being sworn. After the court has been duly sworn to try and determine "the matter now before it," further or "additional" Charges (or specifications) cannot legally be entertained by it at that trial, but must await a separate investigation.[1]

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[1] G. C. M. O. 17, Dept. of the Columbia, 1886; Do. 87, Div. of the Atlantic, 1887; Do. 38, Dept. of Cal., 1890. In the case in the last Order, the action of the court, in directing the judge advocate to insert words in a specification which "magnified essentially the charge against the accused," was properly disapproved. In a further instance in Do. 7, Dept. of the Mo., 1891, the action of the court (in two cases) in changing, upon the request of counsel for the accused, the word "Burglary" to "Larceny" in the 2d Charge, was properly disapproved. The Department Commander, Gen. Merritt, adds—"After charges have been formally referred to a court for trial, the court has no authority to change or amend them upon any material point without the permission of the convening officer. In these cases the best and simplest plan would have been for the court to have proceeded to try the accused on the original charges and then have made the findings accord with the evidence." In a case, in G. C. M. O. 210, Dept. of the East, 1884, where an amended form of charge had been ordered for trial by the Department Commander, the court directed that the original form of the charge be substituted for trial as being, in its opinion, preferable. "This action on the part of the court," observes Gen. Hancock, "was an illegal and unwarrantable assumption of authority which cannot be sanctioned." And see the comment of Gen. Wheaton upon a similar case, in G. C. M. O. 16, Dept. of Texas, 1893.

[2] See G. C. M. O. 17, Dept. of the Colorado, 1894.

[3] In a few early cases, "supplementary" charges, so called, were added *after* "additional" charges. See instance in G. O. 72 of 1826.

VIII. THE SERVICE OF CHARGES.

Form and Manner of Service. The service of Charges consists in delivering personally to the accused a true copy of the charges and specifications upon which it is proposed to bring him to trial. There is properly in military law no other service of charges than a personal service, since the United States is supposed to have the accused always in custody or within its control.[2] The service is usually made by the judge advocate of the court, the adjutant of the command,[3] or other officer or non-commissioned officer detailed for the purpose.[4] In a case of an accused soldier who is illiterate or imperfectly acquainted with the English language, the charges and specifications should be read and their contents explained to him by the officer making the service.[5]

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[1] See the law on this point as stated in DIGEST, 97, 227; also Simmons § 415; Kennedy, 81–2; De Hart, 102; G. C M. O. 39 of 1867; G. O. 13, Northern Dept., 1864.

[2] It may be noted that the entering of a written charge against the prisoner by the officer making the arrest, in the manner indicated in Art. 67, cannot in general answer as a personal service of the formal charges and specifications.

[3] Simmons § 416.

[4] The service may be made by a private soldier or even by a civilian, but this is not usual.

[5] Simmons § 416. And see Rules of Procedure § 14 (B.)

In making service it is desirable, in a case of importance, that the officer, &c., should note on the original draft the fact, date and place of the delivery of the copy. It is also proper that he should compare with the accused the original and copy furnished, so that both parties may be assured that a true copy has been served.

List of witnesses. Though the accused has no right to demand it,[1] it is yet proper and desirable that there should be appended to the Charges as served upon him a list of the witnesses by whom it is proposed to support them. The accused will thus be the better advised of the source and basis of the complaint, and so better enabled to prepare his defence and to determine what witnesses he will require to rebut or impeach those of the government. The list, however, is no part of the Charge and is frequently omitted. Though added and served therewith, it will not oblige the prosecution to introduce the witnesses named or any of them, nor estop it from introducing such other witnesses as may be deemed material.[2]

Time of Service. The law indicates no particular time within which charges should be served upon enlisted men, but, in the case of officers, Art. 71 of the code in effect prescribes that, "except at remote military posts or stations,"[3] a copy of the charges shall be served "within eight days after the arrest." At "remote" posts, &c., the time is left indefinite; but in all cases, whether of officers or soldiers, the interests of justice and of military discipline unite in requiring that charges should in general be served either simultaneously with the arrest, or as soon after arrest as is reasonably practicable.[4]

Effect of Defective Service or Non-Service. The service of charges, however, is not an *essential* proceeding. So, the fact that there is a material variance between the charges upon which the accused is arraigned and the copy which was previously served upon him cannot avail him as a legal objection in bar of trial, or affect the validity of the judgment of the court.[1] Nor can even the fact that there has been no service at all have such effect. Where, hovever, such a variance is apparent, or the accused has been served at a time unreasonably close upon the day or hour of trial, or has been neglected to be served at all, the court, in view of the 93d Article of war, will ordinarily justly grant him, if he asks it, such a reasonable *continuance* as will enable him sufficiently to examine the actual charges and prepare his defence or plea to the same.[2]

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[1] Hough, 705; Simmons § 423; G. O. 52, Dept. of the Platte, 1865.

[2] Simmons § 425; DIGEST, 235, 751.

[3] See this term defined in Chapter IX, where also the provisions of Art. 71 have been more appropriately considered.

[4] See Simmons § 416, 417.

Service of Amendments, &c. If after the service of the original charges, and before arraignment, such charges have been materially amended, there should properly be a re-service upon the accused, as soon as practicable, of the amended charges.[3] and service should be similarly made of "additional" charges, if any are preferred.[4]

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[1] Simmons § 418; Griffiths, 61–2. Note in this connection the ruling of the U. S. Supreme Court in the recent case of Johnson *v.* Sayre, 158 U. S., 109, to the effect that the provision of Art. 43, of the naval code, that the accused shall be furnished with a true copy of the charges and specifications "at the time he is put under arrest," has reference to the time of the arrest for trial by court-martial and not to that of a previous arrest, as an arrest to await the action of a court of inquiry.

[2] Simmons § 418; Griffiths, 62; G. O. 52, Dept. of the Platte, 1865.

[3] See Tytler, 218.

[4] Hough, (Practice,) 245.

CHAPTER XI.

THE FORMAL ORDERING, MEETING, &c., OF THE COURT.

THE subject of this Chapter will be considered under the following heads:—I. The Convening Order, and Orders Supplemental thereto; II. The Meeting and Opening of the Court; III. Preliminary Business; IV. Introduction of Accused; V. Admission and Status of Counsel; VI. The Clerk and other Assistants or Attendants.

I. THE CONVENING ORDER, &c.

Its Effect in General. As already shown, a general court-martial is constituted by a military order, issued either by the Commander-in-chief or one of the military commanders specifically authorized for the purpose by statute. In its usual form this Order is a direction to certain officers named to assemble at a certain time and place and form a court for the trial of a person or persons specifically or in general terms indicated, and to a further officer to act as judge advocate of such court.[1] A copy of the Order, written or printed, is properly, and in practice, delivered or transmitted to each of the officers designated. Its particulars illustrate in brief the law heretofore stated at length in regard to the constitution and composition of general courts.

Particulars—1. The Caption. This, where the court is convened by a military officer, should indicate the headquarters of the command of the officer who makes the order. As—"Headquarters of the Army;" "Headquarters, Army of the Potomac;" "Headquarters, Department of California;" "Headquarters, First

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[1] See pars. 1002, 1003, 1007, A. R.

Division, First Army Corps," &c.,—with the *place* at which the headquarters are situated, and the *date*. If issued by the Commander-in-chief, the Order may be headed—"War Department," or "Headquarters of the Army, Washington, D. C.," according as it is issued through the one or the other. If the order proceeds from the Superintendent of the Military Academy, the heading will be "U. S. Military Academy, West Point, N. Y." The caption should not only identify the command, but indicate that it is one of which the commander is authorized to convene a general court-martial: otherwise it is invalid upon its face.[1] That the Order is dated on a Sunday affects in no manner its validity.[2]

2. Place and Time of Meeting. The Order then proceeds to announce and direct that a General Court-Martial will assemble, or convene, or is appointed to meet, at a certain place, naming a particular post, station, &c.,[3] on a certain specified day, "or," as it is usually added, "as soon thereafter as practicable." The time or place, or both, may be changed by a subsequent Order from the same source.[4] It would not be proper for the court, of its own authority, to depart from either; though if it did so the validity of the proceedings would not necessarily be affected: a general approval of the same by the commander would ratify the irregular action.[5]

3. The Name of the Party or Parties to be Tried. The Order then subjoins: "for the trial of"—naming a certain officer or enlisted man—"and such other persons (or prisoners) as may be brought before it;" or, more generally, since it is not necessary to designate any particular person or persons,[1]—"for the trial of such persons as may be brought before it." Where a particular person *is* named, it is usually an officer, &c., whose trial was the original or special occasion for convening the court. The party named, if any, should of course appear to be a person within the military jurisdiction. If the Order specifies that the court is convened for the trial of a certain class of military persons only, its effect is to preclude the trial of persons not within that class. Thus a court would not be authorized to try an enlisted man under an Order directing it to assemble for the trial of "officers."[2]

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[1] See DIGEST, 548.

[2] DIGEST, 548.

[3] In G. Field O. 4, Dept. of Dakota, 1867, the court is ordered to meet on a transport steamer. In G. O. 76 of 1869, it was directed that—"Military courts will be assembled at posts or stations where the aggregate expenses of trial or examination will be least." Par. 1003 of the present Army Regulations declares—"The place of holding a court is designated by the authority appointing it. Military courts will be assembled at posts or stations where trial or examination will be attended with the least expense."

[4] See De Hart, 88.

[5] In G. O. 172 and 185, Dept. of the Ohio, 1863, the proceedings were disapproved because the court, in one instance, met and acted at a *place*, and, in another, on a *date*, other than as indicated and directed in the convening Order.

4. The Detail of the Members. The Order then proceeds to name the officers who are to compose the court, observing the principles of law heretofore laid down in regard to the class, rank, number, &c. The number must of course be at least five and not more than thirteen. The detail are arranged in order of rank, but the senior and first in the list need not be, and is not in our practice, designated as "President."[3] The precedence given to certain officers as senior to others in the Order is conclusive on the court till changed, as it may be, by a supplemental Order; but an error in the statement of the rank, or relative position of any member, or of his regiment, corps or office, will not affect the validity of the Order.[4]

The detail in the original (or a supplemental) Order is the authority for the members named to appear, be sworn and act on the court,[5] and consequently to absent themselves (if necessary) from their posts or stations, and to receive transportation or mileage if the same be otherwise allowable and duly certified.[6]

5. The Designation of the Judge Advocate. This usually follows the detail of the members, but the Order is not defective if it fail to name an officer as judge advocate: one may be appointed by a supplemental Order. Sometimes indeed the original Order expressly states that a judge advocate will be designated in a subsequent Order.

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[1] See G. O. 52, Div. Pacific, 1865.

[2] DIGEST, 548, and note; G. O. 106, Army of the Potomac, 1862.

[3] See pars. 1002, 1004, A. R.

[4] See G. C. M. O. 100, Navy Dept., 1893.

[5] An officer may be detailed upon a court-martial by telegraph. A telegram, however, to an officer to the effect that he will be, or is to be, detailed by a formal order, will not *per se* authorize his acting as a member. See G. C. M. O. 42, Dept. of the Mo., 1874.

[6] As to the certificate, see *post*.

6. Clause Accounting for the Number, &c., of Members. Where the detail is less than thirteen it is customary to add in the Order, following the language of the 75th Article, a clause to the effect that—"No greater number can be detailed without manifest injury to the service." The early rulings of the U. S. Supreme Court and the Supreme Court of New York, in which this Article was construed, have been heretofore referred to,[1] and it has been seen that such clause is quite unnecessary, the determination of the Commander that thirteen cannot be detailed without manifest injury, &c., being sufficiently signified by the mere fact of his detailing a less number.[2]

The wording of the clause sometimes is—"No *other* members, or officers," &c.; this form being employed for the double purpose of declaring, not only that no other, *i. e.* greater, *number* can be detailed without manifest injury, &c., but also that no officers of other, *i. e.* higher, *rank* can be selected; the object of the clause in its latter purport being to account for the placing upon the detail of an officer or officers *junior* to the accused, which Art. 79 prescribes shall not be done "where it can be avoided." But it is as unnecessary to account in terms in the Order for making the case an exception to the rule of Art. 79, as it is to explain in terms the not detailing of the maximum number. This form of the clause in question is therefore as superfluous as that first mentioned.[3]

The direction sometimes added here, to the effect that, should some of the members fail to arrive, the court may proceed to business provided the number present is not reduced below the legal *minimum*, is also wholly unnecessary; the rule of law (Art. 73) empowering five to constitute a court under all circumstances being now perfectly well understood.

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[1] See Chapter VII.

[2] See DIGEST, 88.

[3] DIGEST, 89.

7. Direction as to Hours of Session. Where, in the opinion of the convening authority, the exigencies of the service, or other circumstances, require that an exception be made to the general rule, in regard to the proper hours of session, prescribed in Art. 94,[1] it is added in the Order that—"The court will sit without regard to hours."[2] This direction is not unfrequently given in a supplemental Order.

8. The Certificate as to Travel. The Act of June 30, 1882, c. 254, in appropriating, among other things, for the mileage of officers travelling "on duty under orders," added—"the necessity for such travel to be certified by the officer issuing such order." In cases, therefore, where the convening Order details officers stationed at posts, &c., other than the post or station at which the court is to be held, the following certificate is now subjoined:—"The travel involved in the execution of this Order is necessary for the public service,"[3] or in terms to this effect.

9. Subscription of the Order. The original order, (which may be written or printed,) should appear subscribed, in writing or in print, by the President or Secretary of War;[4] or by the military Commander, with his rank and a reference to his command as indicated in the caption. The subscription should be consistent with the caption. Copies of the Order are commonly further authenticated by the signature of the Adjutant General, Assistant Adjutant General, or other staff officer.

Supplemental Orders. Prior to the organization of the court the Convening Order may be amended, modified, or supplemented by any number of subsequent Orders from the same source,—by which a member or the judge advocate may be relieved, new members added or substituted, the place or time of meeting changed, the hours of session extended, &c. In the record of trial these Orders will properly follow the original

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[1] See this Article as separately considered in Chapter XXV.

[2] G. O. 9 of 1892 declares that when authority is thus given, "the order must state that it is necessary for the sake of immediate example."

[3] See G. O. 86, 131, of 1882.

[4] The subscription by the Secretary is presumably of course by the authority of the President and his act in law. See G. O. 35 of 1850; also Chapter III—ORDERS.

Order, so that they may readily be compared therewith, and the authority of the court and of each member, and of the judge advocate, to act as they are shown to act in the proceedings, may clearly appear. Supplemental Orders may also be issued at any stage *pending the trial:* they are comparatively rare, however, after the arraignment.

II. THE MEETING AND OPENING OF THE COURT.

Arrival, Coming to Order, and Seating of Members. Pursuant to the Convening Order, (and the supplemental Orders, if any,) the officers named in the detail for the court assemble in full uniform[1] at the time and place named, in such building or room as may have been set apart for the purpose by the post, &c., commander, or provided by the quartermaster's department. When five or more have arrived, they may proceed to business: till five appear those present usually adjourn from day to day to await the attendance of at least the minimum number.[2]

A quorum of members being assembled, they are called to order by the senior as presiding officer, and, as the roll is called by the judge advocate, take their seats according to their relative rank alternately at the right and left of the president, in the manner of all judicial bodies. The judge advocate is commonly seated at the table opposite the president, and seats are provided at his right and left for the accused and his counsel, and for the witnesses; the former being also generally furnished with a separate table.

Opening to the Public. It is, in the majority of cases, at this stage that the court is pronounced by the president to be open, or is considered to be open, to the public, the accused being at the same time introduced. Where indeed there is preliminary business to be deliberated upon, of the kind—presently to be considered—which does not require the presence of the accused, the public is also properly excluded till this is transacted: in the discretion of the court indeed the opening may be deferred till the time has arrived for the arraignment. In general, however, the opening of the court either concurs with its original assembling or follows closely upon it. It may properly, therefore, be noticed at this point.

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[1] As to the wearing of uniform, see remarks in G. O. 29, Dept. of the South; 1872; Do. 43, Dept. of Dakota, 1874.

The more recent G. O. 103 of 1890, in prescribing that the full uniform coat "will be worn on all dress occasions," adds—"except that, when rendered necessary by the state of the weather, the president of a court-martial, court of inquiry, or retiring board, may authorize undress uniform to be worn by the members of the court or board at their sittings."

[2] That a less number than a quorum is authorized to adjourn, see DIGEST, 88.

Originally, (under the Carlovingian Kings,) courts-martial, (according to Von Molitor,[1]) were held *in the open air*, and in the Code of Gustavus Adolphus, (Art. 159,) criminal cases before such courts were required to be tried "*under the blue skies.*" The modern practice has inherited a similar publicity. With us, when once opened, the court-martial room—though at any stage of the trial it may be permanently closed at the discretion of the court—is, in general, continued open throughout the investigation, (except when the doors are closed for deliberation on interlocutory matters,) and also during the closing arguments of the counsel, or till the final clearing for judgment.[2] While thus open the public is allowed to come and go much as in the civil courts. Noisy and improper persons may of course be required to withdraw and if necessary be forcibly excluded. So, if it is determined by the court, as it may be, that its proceedings shall not be reported except officially, newspaper and other reporters may be required not to take notes, under penalty of exclusion if they attempt it.[3] In general, however, such reporters are freely admitted, and sometimes even special accommodation is provided for them. Where there is difficulty in clearing the court, excluding particular persons, or keeping order, the proper commander at the post, station, &c., may be called upon by the court to furnish, and will properly furnish, a sufficient force for the purpose. In the cases also of this nature which are within the provision of Art. 86, yet to be considered, the court may itself punish as for a contempt.

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[1] And see, on this subject, the learned and interesting publication—"Über Öffentlichkeit im künftigen Deutschen Militärstrafprozesse," by M. Gr. Schultheiss, Würzburg, 1893.

[2] "At other times," (*i. e.*, other than occasions of clearing for deliberation,) "except to those persons who have been summoned as witnesses, a court-martial is open to the public, military or otherwise, subject to the capacity of the room or tent in which it is held, and the convenience of the court and parties before it." Simmons § 454. And see Clode, 135–6; De Hart, 94; DIGEST, 318.

[3] See Clode, 139; Hough, (P.) 778; De Hart, 109. In some cases the court has made a special order on the subject early in the proceedings. See Gen. Whitelocke's Trial, p. 7; Lt. Col. Johnston's do., p. 3; Col. Quentin's do., p. 349; Capt. D. Porter's do., p. 377; Capt. Hurtt's do., p. 5. In the first-named case the reason was assigned that otherwise subsequent witnesses would be advised as to what previous witnesses had testified. On Gen. F. J. Porter's Trial, p. 31, the judge advocate having called the attention of the court to the fact that the testimony as published in the newspapers contained gross errors, the court cautioned the reporters present against a continuance

III. PRELIMINARY BUSINESS.

Five members having assembled, a *court* is constituted—not a court empowered to proceed to trial, because the members have not as yet qualified for this purpose by taking the oath prescribed by Art. 84, but a court competent to proceed with the *preliminary* business. This business is of two kinds,—(1) that which may be transacted before the accused appears or in his absence,—(2) that which can be transacted only in the presence of the accused.

Before the Introduction, or in the Absence, of the Accused—***Settlement of questions of precedence.*** In the great majority of cases, no business whatever is found to be required to be transacted by general courts-martial at this stage, the occasions for such business being removed by the previous proper revision of the charges, framing of the convening order, &c., at headquarters. From time to time, however, an error in such order, caused by a misconception of the relative rank of members, may give rise to a question of precedence on the court. The order itself can of course be amended only by the convening

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of the same. In U. S. *v.* Holmes, 1 Wallace, Jr., 10–11, it was announced on the trial by Mr. Justice Baldwin:—" We have the power to regulate the admission of persons and the character of proceedings within our own bar. * * * No person will be allowed to come within the bar of the court for the purpose of reporting, except on condition of suspending all publications till after the trial is concluded." But at *military* law, a publication, after an order by a court-martial prohibiting it, would not be punishable as a contempt. See Chapter XVII.

The right to prohibit publications does not authorize the seizure by the court of notes taken in violation of its order. In the case of Ricketts *v.* Walker, Calcutta, 1841, (Hough, P., 718; Manual, 162, note.) a reporter recovered nominal damages against the president of a court-martial for causing the forcible seizure of his notes, which he had continued to take after being ordered to desist.

authority; but a slight error of the kind indicated, such for example as may occur from mistaking the date of a commission, may often be amicably corrected by the members themselves in their taking their proper places without waiting for the formal modification of the order. Where the error is less simple, as where its correction will require a construction of the law by the convening officer, the proper course will be to refer to him the question involved for his determination. Now that brevet rank is no longer operative on courts-martial, questions of precedence are less common than formerly. The most recent question of any importance of this class was whether an officer, while acting as aid-de-camp of the General or Lieut. General, should sit on a court according to his increased rank as such or the inferior rank of his actual military office; and it was held by the Judge Advocate General,[1] and the Attorney General[2] concurring with him, that the former, as being the legal rank of the officer at the time, should determine his relative position on the court.

Questions as to the sufficiency of the charges. On looking over the charges in the case to be tried, copies of which will properly have been laid before the members by the Judge Advocate, the same may be found by the court to be so clearly defective upon their face as properly to call for revision before trial.[3] As already pointed out, the court has at this stage no authority of itself to make or direct to be made any material modification of the charges. If, therefore, the necessity for such modification is obvious, the court will at once communicate on the subject with the convening commander, with a view to having the proper correction or re-framing ordered. Or if the judge advocate has already been authorized by such commander to make, with the concurrence of the court, such amendments of the pleadings as may be found desirable, the required changes may be made forthwith.

Other questions. The court at this stage may also entertain any serious consideration—suggested by the form or contents of the convening order, or by the charges, or the two together—affecting its own legality or powers as a military body. But unless the defect be a *palpably fatal* one, which, if not corrected, will clearly invalidate the proceedings, the court will not in general, of its own motion, raise an objection calling in question the original authority of the commander, or its own right to exist or to try, but will leave the same to be regularly raised by the *accused*, as presently to be indicated.

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[1] DIGEST, 146.

[2] 16 Opins., 551. As to the right of precedence, on courts-martial, of assistant surgeons with the rank of captain, see DIGEST, 176.

[3] See Simmons § 457; De Hart, 111.

After the Introduction of the Accused, and before the Court is Sworn. The principal preliminary business of the court at this stage will consist of—1. Entertaining objections by the accused to further proceedings; 2. Entertaining objections by way of challenge to individual members.

1. At this point the accused, being present, may properly raise, (and the court may properly hear and determine,) any objection going to the legal existence of the court or its authority to proceed further in the case. Thus he may object that the court has not been legally constituted or composed, or that it is without jurisdiction either of the person or of the offence or offences charged. Till the charges are regularly before the court, upon the arraignment, an objection to these or to the power of the court to try them, would be premature. But the present stage is an appropriate occasion for raising, arguing and passing upon exceptions to the court as constituted or composed, such exceptions being of a radical character. What objections of this class would be valid and final has already been indicated in the Chapters on the Constitution and Composition of General Courts. The Chapter on Jurisdiction has also exhibited the grounds on which could be based exceptions to the authority of the court to try the accused. These classes of preliminary objections need not therefore be further considered. It will be sufficient to remark that, in case any of the objections referred to be interposed by the accused and sustained by the court, the president[1] will properly communicate the facts to the convening authority for such action as he may deem expedient.

2. Whether or not any exceptions to the court as a whole be taken at this stage,—and such exceptions are comparatively rare,—this time is the proper one for offering objections to the mem-

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[1] See DIGEST, 318 § 17.

bers by way of *challenge* under the 88th Article of war. The subject, however, of such objections, being an extended one, will best be considered in a separate Chapter.

IV. INTRODUCTION OF ACCUSED.

Cases of Officer and Soldier Distinguished, &c. The court having no control over the person of the accused outside the court-room,[1] the accused—if an officer—will be conducted to the presence of the court by the adjutant, officer of the day, or other officer detailed for the purpose; or he will be ordered by the proper superior to appear before the court, or to report to the judge advocate for trial; or, (as where not in arrest,) he will appear voluntarily when notified of the time and place.[2] The first form is not commonly resorted to except in a case of close arrest. An enlisted man is usually sent, by the officer of the guard or adjutant, to the court-room under guard, his guard being directed to report to the judge advocate. In the case of a non-commissioned officer a guard may be dispensed with. Upon an adjournment, the accused is remanded, or reverts, to the custody, control, or status which he was under when first introduced.[3] Whether officer or enlisted man, the accused should appear before the court in uniform; officers and non-commissioned officers without their side-arms or sashes.[4]

Prisoner not to be Introduced in Irons. The accused should not be introduced with hands or feet fettered, and if he has been previously confined in irons these should be taken off before he is brought into the court-room,—unless there be reasonable apprehension of an attempt to escape, or of violence on his part, or of a rescue. It is a principle as old as the common law that, except where such apprehension is entertained, the prisoner, at his arraignment, should be free in all his limbs before the court, so that he may be in no manner hampered in making his defence.[1] In the practice of courts-martial, inasmuch as the accused is introduced into the court before arraignment in order to be afforded an opportunity to exercise the right of challenge, this privilege of freedom from physical restraint is allowed him and enforced by the court from and after his first appearance, throughout the trial.

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[1] Simmons § 356, 473; De Hart, 113; DIGEST, 314.

[2] At the opening of Gen. Hull's trial it is stated, (p. 3,) that the accused appeared "accompanied by an aid-de camp."

[3] Simmons § 473.

[4] See G. O. 29, Dept. of the South, 1872. But see Circ. No. 9, (H. A.,) 1890, as to the clothing to be worn by a *deserter*, "until after the determination of the trial," &c.

Disposition of Accused when not Presentable, or Ill, &c. If the accused makes his appearance improperly dressed, or in a dirty or unkempt condition, the court may require him to be removed and returned with the neglect remedied. If he is intoxicated, he should not be allowed to be arraigned till he is sober. If he be ill, and unable to leave his quarters or the hospital—a fact which should properly be shown by a medical certificate—the court will ordinarily adjourn to a day on which he can probably appear in a condition to plead and defend.

V. ADMISSION AND STATUS OF COUNSEL.

Proper Time for Admission. It is upon the original introduction or appearance of the accused that his counsel will properly be admitted, if he make application to the court for the purpose.[2] Hughes[3] fixes the proper time for such application as after the plea; De Hart as after the court has been sworn, though he adds that the privilege "may be allowed at any time."[4] It is obvious that, prior to the organization of the court, counsel may be of material assistance to the accused, especially in the presenting of objections to the authority of the court to proceed with the trial, and in the offering and maintaining of challenges: it is at this early stage, therefore, that counsel will most advantageously be admitted.

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[1] "Every person, at the time of his arraignment, ought to be used with all the humanity and gentleness which is consistent with the nature of the thing, and under no other terror or uneasiness than what proceeds from a sense of his guilt and the misfortune of his present circumstances; and therefore ought not to be brought to the bar in a contumelious manner, as with his hands tied together or any other mark of ignominy and reproach, nor even with fetters on his feet, unless there be some danger of a rescous or escape." 2 Hawkins, c. 28, s. 1. And see 2 Hale, 219; Layer's Case, 16 How., St. Tr., 101, 129; Rex *v.* Waite, 1 Leach, 28; 1 Bishop, C. P. § 731, 955; Tytler, 220; Kennedy, 41; Simmons § 473; De Hart, 113; DIGEST, 334-5; People *v.* Harrington, 42 Cal., 165; G. O. 52, Dept. of the East, 1869; Do. 47, Dept. of Dakota, 1871.

[2] A court-martial has no authority to *assign* counsel. The court, however, or judge advocate, will properly advise an ignorant soldier of his privilege to be assisted by counsel if desired. But see G. O. 29 of 1890, cited in text, *post.*

[3] Page 53.

[4] Page 132.

The Admission a Privilege, not a Right. General Order, No. 29, of 1890, now requires commanders of posts, where general courts-martial are convened, to detail, at the request of an accused, a "suitable officer" as his counsel, if practicable. But in general it is to be said that the admission of counsel for the accused in military cases, is not a right but a privilege only,[1] but yet a privilege almost invariably acceded and as a matter of course;[2] and this whether the counsel proposed to be introduced be a military or civil, professional or unprofessional person.

But being a privilege, it is subject to be restricted by the court. Thus while an adjournment will in general be had, or a continuance be granted, to afford the accused an opportunity to procure suitable counsel, the court will not delay beyond a reasonable time for such a purpose,[3] and at a period of war or other public emergency, when immediate action is called for, may even refuse to delay at all. So the court may sometimes properly decline to admit the particular person offered as counsel,—as where he is an attorney who has been prohibited on account of misconduct from practising in the executive departments, or an officer dismissed for cowardice or fraud and with whom officers are precluded from associating by the 100th Article of war, or a person of notoriously bad character, or who is otherwise clearly exceptionable.[1] Further, the court may exclude a counsel guilty of disrespect or other improper behaviour in its presence, or who unreasonably delays the proceedings by repeated technical objections, although such behaviour may not be of a sort made punishable by Art. 86.[2] But where counsel is thus excluded the court will ordinarily allow the accused a reasonable time for procuring other counsel if he desire it.

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[1] See 1 McArthur, 44; Hough, (A.) 38; Kennedy, 95; Hughes, 53; Macomb, 47; Benét, 94; DIGEST, 199. *Contra*, De Hart, 318. And see Tytler, 251.

[2] Art. VI. of the Amendments to the Constitution provides that "in all criminal prosecutions" the accused shall "have the assistance of counsel for his defence." The reference here is to prosecutions before the *criminal courts of the United States*, only. Barron *v.* Mayor of Baltimore, 7 Peters, 243; Ex parte Watkins, Id., 573; Twitchell *v.* Com., 7 Wallace, 326; Edwards *v.* Elliott, 21 Id., 557; Walker *v.* Sauvinet, 92 U. S., 90; Pearson *v.* Yewdall, 95 U. S., 294; 1 Bishop, C. L. § 725; Wharton, C. P. & P. § 920. Military courts, however, though not bound by the letter, are within the *spirit* of the provision.

[3] DIGEST, 110, 311; G. C. M. O. 25 of 1875.

Status of Counsel. The strict rule which usage formerly prescribed in regard to the action of counsel on military trials, and especially enforced as against professional counsel, was such as to render their position embarrassing if not indeed humiliating. By this rule they were precluded from all *oral* communication, not being permitted to examine witnesses *viva voce*, or to address the court by statement, motion, or argument, but being required to express themselves either through the accused or in writing.[3] In his recent edition of 1875, (§ 476,) Simmons states that there has not been "any relaxation of the well-established rule of courts-martial as to the silence of professional advisers and their taking no part in the proceedings. On the contrary it has been felt," he adds, that such courts should be "more than ever on their guard to resist any attempt to address them on the part of any but the parties to the trial." But the more recent radical reconstruction of the British military law has done away with the previous usage in this regard; and in the Rules of Procedure (§ 87) it is declared that the counsel both of the prisoner and of the prosecutor at a military trial shall have the same right as the party for whom he appears to call and orally examine and cross-examine witnesses, as well as to make objections and statements, put in pleas, and address the court.

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[1] In G. O. 73, Dept. of the East, 1865, the admission of a regimental commander as counsel for a member of his regiment, before a court composed entirely of officers of the regiment, was commented upon as improper.

[2] A counsel who was a military man would be liable to charges and trial under the circumstances. See the two cases of officers tried for improper conduct while acting as counsel, published in G. C. M. O. 37 of 1873; Do. 5, Dept. of the Platte, 1874.

[3] No rule of military procedure has been more strictly insisted upon than this. See Tytler, 251; Delafons, 166; Hough, 673; Kennedy, 95; Napier, 93; Hughes, 53; Hickman, 74; Franklyn, 49; Gorham, 39; Macomb, 30; O'Brien, 236; De Hart, 132, 318; Gilchrist, 16; Gen. Hull's Trial, 14; Capt. Thomas Howe's Trial, 253; G. O. 7, 16, Dept. of the Mo., 1862; Do. 52, Dept. of the Pacific, 1865; Do. 52, Dept. of the Cumberland, 1868; Do. 32, Dept. of the Gulf, 1875; G. C. M. O. 113, Dept. of the East, 1871. This doctrine was carried so far in the British practice that professional counsel were not even allowed to read to the court the concluding defence or statement of the accused. Simmons § 586, and other authorities above cited; also Gen. Whitelocke's Trial, 763; Lieut. Hyder's Trial, 106. Warren, (p. 153,) complains that, when acting as counsel before a court-martial, he was permitted only to communicate in whispers with his client!

As to the practice before courts-martial of the United States,—while the doctrine in question is quite strictly laid down in the treatises and in sundry Orders, the actual procedure has become much more indulgent and reasonable; not merely military but professional counsel being in general permitted to examine the witnesses and address the court without objection on the part of the members. Occasionally indeed the old rule is insisted upon at the outset, though relaxed later; but more frequently much the same license is allowed at all stages as at an ordinary criminal trial, subject, however, to a restriction of the privilege when counsel by their prolixity, captiousness, disrespectful manner, or other objectionable trait, fatigue or displease the court.[1] Thus, in practice, the old rule is mainly held in reserve, to be enforced by the court at its discretion in exceptional cases. Objection to the reading of the final address, or to a closing oral or written argument, by the counsel, is now of the rarest occurrence.[2]

His relation to accused and court. A properly qualified counsel will of course do his full duty toward the accused while preserving by his deportment the respect of the court. He will only assist the accused in his plea, in the making of such motions as may be desirable, in the production, examination and cross-examination of witnesses, in the adducing of the necessary written evidence and the testing of that offered by the prosecution, and in the statement or argument. Counsel *detailed*, under the G. O. of 1890, above mentioned, have in some instances discovered a tendency to render their services in a perfunctory or imperfect manner.[1] When this appears, and the court is of opinion that the defence of the accused is not being properly presented, it may well adjourn and request the post commander to assign new counsel. Detailed counsel have also in some cases manifested an undue independence toward the court, not treating it with proper courtesy, and, in their arguments commenting disrespectfully upon its rulings.[2] Indifference to the interests of the accused, or a lack of deference toward the court, is, as remarked in a recent Order,[3] "incompatible with a faithful and efficient discharge of the important trust confided" to counsel.

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[1] In some of the cases in which the old rule was enforced, the counsel had either used "scurrilous" language, or had taken up time with inappropriate pleas or motions. See G. O. 16, Dept. of the Mo., 1862; Do. 52, Dept. of the Cumberland, 1868; Do. 32, Dept. of the Gulf, 1875; G. C. M. O. 7, Dept. of the Mo., 1888.

[2] See G. O. 7, Dept. of the Mo., 1862; Do. 7, Id., 1888; Do. 52, Dept. of the Pacific, 1865; also Gen. Porter's Trial, (1862.) In the history of military trials some very able arguments have been delivered by legal counsel; such, for example, as those of Hon. T. H. Benton on the trial of Lt. Col. Fremont, of Hon. Reverdy Johnson on the Assassination Conspiracy Trial, of Jas. T. Brady on the trial of Beall, and of D. D. Field on the court of inquiry in the case of Gen. A. B. Dyer. The ability of the arguments of counsel before French *conseils de guerre* has been especially marked; as for instance the argument of Berryer on the jurisdiction of the court in the case of Marshal Ney, and that of Lachaud on the merits at the trial of Marshal Bazaine.

Counsel for Parties other than the Accused. The subject of the employment of counsel *to assist the judge advocate* will be remarked upon in Chapter XIII. Where the *prosecuting witness* is properly required to be present during the trial, counsel may be permitted to attend him if he desires it. Such attendance is not of frequent occurrence, but has been acceded to in sundry cases of unusual importance. Whether counsel to represent *other persons interested in the investigation* may be admitted should depend mainly upon their relation, if any, to a recognized "party" in the case, but is a matter in the discretion of the court. In the leading case on the subject, that of Commander Mackenzie of the navy, in which such admission was applied for,—*viz.* by two counsel, (representing the relatives of the officer executed by order of the accused,) who asked to be allowed to be present, independently, at the trial and examine and cross-examine the witnesses, &c.,—the application was denied by the court. In the army such counsel might perhaps have been admitted on the application of, and to assist, the judge advocate, or prosecuting witness, if any, but scarcely otherwise.

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[1] G. C. M. O. 31, Dept. of the Colorado, 1893; Do. 66, Dept. of the Platte, 1893.

[2] G. C. M. O. 66, Dept. of the Platte, 1893; Do. 24, Dept. of the Columbia, 1894.

[3] Gen. Brooke, in the Order of his Department above cited.

VI. THE CLERK AND OTHER ASSISTANTS OR ATTENDANTS.

Here may be noticed the minor *personnel* of a military investigation, such as reporters, clerks, interpreters, guards, orderlies, and—where specially authorized—provost-marshals.

Reporters. The appointment of the official "reporter" being specially devolved by statute—Sec. 1203, Rev. Sts.—upon the Judge Advocate, his duties, &c., will be remarked upon in Chapter XIII. The authority for his employment is indicated, and his compensation fixed,[1] in pars. 1046 and 1047 of the Army Regulations. The oath of the reporter is prescribed in Circular, No. 12, of 1892.

Clerks. It is declared in the Army Regulations, par. 1046, that—"The convening authority may, when deemed necessary, authorize the detail of an enlisted man to assist the judge advocate of a general court-martial in preparing the proceedings of the court." In a case of special difficulty, or where a protracted trial is involved, an increased number of enlisted men may be detailed as clerks. Such employment does not entitle to "extra" or additional pay. Par. 1048, A. R., directs —"no person in the military or civil service of the government can lawfully receive extra compensation for clerical duties performed for a military court." Either the judge advocate, or the accused, may employ, but at his own expense, a civilian clerk to attend and assist him at the trial. The annual Appropriation Acts no longer, as formerly, provide for "compensation of citizen clerks."[2]

Clerks, unlike reporters, are not required to be sworn.

Interpreters. Where any of the proposed witnesses are foreigners who cannot speak our language, or who speak it imperfectly, a competent person is procured by the judge advocate to act as an interpreter on the trial.[1] Interpreters, in our practice, are summoned and paid as witnesses,[2] and sworn as such.[3] Where a regular interpreter has not been obtained, one of the witnesses present may, if competent, be used as an interpreter of the testimony of the others;[4] or a bystander or even one of the court may be resorted to. In an important case, the accused may properly have summoned for him a person as interpreter, by means of whom to correct the translation of an interpreter summoned on the part of the prosecution.[5]

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[1] For the payment of such compensation appropriation is annually made by Congress. See next note.

[2] The only appropriation now is—"For compensation of reporters and witnesses attending upon courts-martial and courts of inquiry, &c." Act approved Feb. 12, 1895.

Orderlies, Guards, &c. The necessary attendant or attendants—orderlies, messengers, or guards—will properly be furnished, from the enlisted force present, by the post or local commander, on the application of the judge advocate, whose business it will be to act as messengers for the court and judge advocate, protect the court from disorder, guard public property in the court-room, &c.

Provost-Marshals. In cases of special consequence, involving unusual details of administration, the convening authority, if he deem it expedient, may detail an officer as *provost-marshal*, whose duty it will be to serve subpœnas, attachments and notices, take charge of prisoners and witnesses, enforce order in the court-room, and otherwise execute the mandates of the court and directions of the judge advocate. The attendance, however, of such an auxiliary official, though apparently not unfrequent in the British practice,[6] has, with us, been more commonly resorted to before State militia courts[1] than before courts-martial of the United States. At the trial of the Conspirators against the life of President Lincoln, &c., in 1865, a "special provost-marshal" was assigned to attend the commission.[2] During the late war provost-marshals were frequently appointed or detailed as executive officials,[3] but, though sometimes acting as judges of provost courts,[4] they were rarely employed in connection with general courts-martial.[5]

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[1] Interpreters are not often required in our practice. The British authorities, especially with reference to their employment in India, are much more full than ours in regard to the qualifications, &c., of interpreters. See Simmons § 477-479; McNaghten, 137; Gorham, 40; Jones, 68; Rules of Procedure, 27 (D,) 71 (A,) (C.)

[2] Par. 1049, A. R. Where exceptional service is required of an interpreter he may perhaps be further compensated out of the fund appropriated for the contingencies of the army.

[3] The form of oath to be administered to an interpreter is set forth in Circ. No. 12, (H. A.,) 1892.

[4] People *v.* Ramirez, 56 Cal., 533.

[5] O'Brien, 259-260.

[6] See Simmons § 490. At an early period he executed sentences, and, originally, appears to have been an officer of the Marshal's Court. Grose, 59, 73.

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[1] See Maltby, 125; The Militia Reporter, pp. 9, 106, 159, 249; Trial of Lt. Col. Bache, (Pa. Militia,) p. 4.

[2] DIGEST, 315, note.

[3] Provost-marshals were appointed under the Conscription Act of March 3, 1863, as agents for enforcing the draft, arresting persons avoiding or obstructing the same, &c., under the orders of a Provost Marshal General. Besides these statutory officials, officers of the army were *detailed* to act as provost-marshals for the performance of multifarious duties in the large commands. Every duty indeed which did not clearly fall within the specialty of some particular branch of the service seems to have been devolved upon this invaluable class of officers. Among their occupations may be noted the arresting of marauders, stragglers, deserters, soldiers without passes, spies, disorderly persons, persons violating the laws of war, prisoners of war without paroles, &c., the supervision of paroled prisoners, execution of sentences of death and imprisonment, the examination of deserters from the enemy, the control of the business of sutlers and other trades, the issuing of passes and permits, the care of refugees and freedmen, the charge of captured property, the administering of oaths of allegiance, the regulation of the delivery of the mail and express packages and of the circulation of newspapers, the protection of private property, protecting elections, &c. Among the many Orders prescribing their duties, the following may be cited: G. O. 60, 188, Army of the Potomac, 1862; Do. 10, Id., 1863; Do. 35, Dept. of the Mo., 1862; Do. 22, Dept. of the South, 1864; Do. 146, Dept. of the Gulf, 1864; Do. 23, Dept. of Kans., 1864; Do. 4, and Circ. 3, Dept. & Army of the Tenn., 1864; Do. 65, Dept. of La., 1865; Do. 1, Dept. of Miss., 1865; G. Field O. 3, Army & Dept. of West Miss., 1865; Circ. 12, Dept. of Va., 1865.

The provost-marshal is still recognized in the military code—in Art. 67—as an officer who may have charge of prisoners. See Chapter IX.

[4] These *war* courts are remarked upon in Part II.

[5] Gen. Wilkinson, Memoirs, vol. 1, p. 75, expresses the opinion that a court-martial "ought always to be attended by orderly officers and a guard, proportioned to its rank and the solemnity of the inquiry, for the preservation of order and the maintenance of decorum, the escort of prisoners, and the service of precepts."

CHAPTER XII.

THE PRESIDENT AND MEMBERS.

IT is with the appearance of the accused that the capacities, individually and relatively, of the other persons concerned in the proceedings begin to have the special significance which they carry through the trial. It will be well therefore to consider here the peculiar functions of the President and Members, and then of the Judge Advocate.

THE PRESIDENT.

Who he is. In the British law, the president of a general court-martial is a distinct official appointed as such separately from the other members. In our law, prior to 1828, he was in general expressly detailed as such. Since that date he has been simply the *senior member*, and a specific designation of an officer as president, though found in some early cases, is now never made in Orders convening military courts in our service.[1]

The senior in rank of the officers named in the convening order, if present at the assembling of the court, becomes president; if not present, the senior of those who *are* present presides, till a senior to himself arrives or is added to the court. If the presiding officer is removed by any casualty, or is relieved, or absents himself, the senior in rank of the members remaining succeeds him. Throughout the trial it is the senior for the time being who presides. If a junior member is promoted in the army above the senior pending the trial, such member becomes president.[2] It is immaterial what may be the actual rank of the senior,[1] or to what branch of the service he belongs: he is president solely because of his seniority in rank in the army to the other members.

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[1] See par. 1004, A. R.

[2] The fact of his promotion and of his taking his seat accordingly as president should be formally entered in the record of trial on the day on which it takes place.

His Functions—As Presiding Officer. The only *statutory* function assigned to the president by our law is that of administering the oath to the judge advocate, required of him by the 85th Article of war. The Army Regulations, par. 1005, (employing the language of the Secretary of War in the case of Lt. Col. Backenstos,[2]) declare that—"The president of a court-martial, besides his duties and privileges as a member, is the organ of the court to keep order and conduct its business. He speaks and acts for the court in each instance where a rule of action has been prescribed by law, regulations, or its own resolution." According to the function here assigned him, the president opens the court and calls it to order; announces it adjourned at the close of the session, when adjourned by vote of the majority, or at the hour required by Art. 94; preserves order during the session, checking anything like disorder or indecorum on the part of the members of the court, the judge advocate, the accused, the counsel,[3] the witnesses, or the audience, while at the same time seeing that the rights of every one entitled to consideration are respected;[4] conducts the routine of each day, calling for or announcing the proper proceedings in turn, and takes care that the regular forms of business are duly observed. In the absence of objection, he may direct as to the more familiar points of order and procedure, and will properly take the formal action incidental to the deliberation of the court—such as the submitting to the court of a proposition or motion by a member,[5] the ordering of the court-room to be cleared when requested by a member, or voted, or when required by law, the declaring of the decision of the court after deliberation had, &c. So, in the absence of objection, or where the acquiescence of the court is to be presumed, he may give assent to a member or the judge advocate leaving his seat for a temporary purpose, to a brief consultation between the accused and his counsel, or other slight matter of indulgence or comity. But in such and all other cases in which he acts as presiding officer, he simply acts for and in the name of the court. Other than as its representative and mouthpiece he has no separate authority. He can make no ruling as to testimony or otherwise, and can announce a ruling only as a conclusion of the court. He can neither act independently of the court,[1] nor can he act against the will of a majority of the court.[2] On the other hand he cannot trench upon the authority of the Commander—as by excusing a member from attendance,[3] &c.

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[1] In the British law, the president of a general court, (except in certain special cases,) "shall not be under the rank of a field officer." Army Act § 48, (9.)

[2] See G. O. 14 of 1850, also cited *post*.

[3] Note in this connection the 1st Specification in G. O. 37 of 1873.

[4] "He is responsible that every person attending the court is treated with proper respect." Jones, 70. And see Gorham, 33.

[5] The president is not authorized to decide that a proposition advanced by a member shall not be submitted to the vote of the court. G. C. M. O. 55, Dept. of the Mo., 1884.

As a Member. In deliberating, voting, and on all occasions of judicial action, the president, in our law, simply counts as a member. As a member he is but the equal of the other members.[4] Upon a question or issue raised he may state his views like any other member, but it is for the *court*, by a majority, to decide.[5] In the British service, "in the case of an equality of votes on the sentence, or any question arising after the commencement of the trial except the finding," the president is given a casting vote.[6] In our law he has no casting vote on any occasion, his vote counting for no more than the vote of any other member.

As Channel of Communication with the Commander. As the official organ of the court it is through him that communications from the convening or reviewing officer should in general be made to the court, and by him that the court should communicate with that authority. As Jones[1] writes of the same official in the British law:—"He is the channel of communication between the court and the convening authority." With us also this is deemed to be the regular and official course, though the judge advocate has not unfrequently been made the medium.[2]

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[1] As by assuming of himself to revise the record. See DIGEST, 679.

[2] See G. O. 14 of 1850, in which the action of Lt. Col. Backenstos, in assuming as president to adjourn the court against the vote of the majority, is condemned as wholly unauthorized and irregular. In Orders of the Dept. of Dakota, (G. C. M. O. 89, 165, of 1882,) the point is noticed that the president is not authorized to appoint a day to which the court shall adjourn or the trial be continued, or to change the day which has been fixed by the court.

[3] See G. O. 2, Dept. of the Mo., 1862.

[4] See par. 1005, A. R.

[5] G. C. M. O. 55, Dept. of the Mo., 1884.

[6] Army Act § 54 (8.)

As a Source of Command. The president of a court-martial has no command as such. He cannot, as such, issue an *order*, properly speaking, to a member or the judge advocate, or to any other military person present. A failure, however, to comply with his reasonable and proper directions in keeping order and conducting the business of the court, while it will not subject the delinquent to a charge of disobedience of orders in violation of Art. 21, will render him amenable to trial under Art. 62. It is the duty of the president to call upon members who have absented themselves from a session, or part of one, for an explanation of such absence, but in such requirement, or any other which he may properly make, he does not act in the capacity of commander, and if his requirement is not duly complied with he can only report the fact to the convening authority for *his* action.[3]

As Authenticating Officer. The Army Regulations, par. 1037, direct that the president of a court-martial shall, (with the judge advocate,) authenticate its record by his signature in each case. These acts must be performed by the member who is the senior in rank of the members present at the completion of the proceedings, although during all the proceedings prior to the final another officer may have been senior and president. The *form* of his authentication will be indicated in treating of the Record.

THE MEMBERS.

A Majority to Govern. We have seen that the law gives to each member, the president included, an equal voice, and it is to be added that all questions and issues, which are required to be passed upon by the court in the course of the proceedings, are decided by a majority vote. This general rule applies to the questions which arise upon the finding and in the adjudging of the sentence equally as to the questions and issues raised by challenges, special pleas, objections to testimony, applications for continuance, motions and other interlocutory proceedings; and to questions raised by or among the members themselves equally as to those raised on the part of the accused or judge advocate. The only exception to the rule is that prescribed by Art. 96—that a two-thirds vote shall be required to adjudge a capital sentence. But the finding of guilty which must precede such a sentence may be arrived at by a majority as in all other cases.

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[1] Page 70. And Gorham, (p. 33,) observes:—"The president acts in the name of the court *in correspondence*."

[2] "Strictly, communications from the convening authority to the court as such, (and *vice versa*,) should be made to, (and by,) the president as its organ; communications relating to the conduct of the *prosecution*, to, (and by,) the judge advocate." DIGEST, 318.

[3] G. C. M. O. 29, Dept. of Texas, 1884.

Tie Vote. All the members must vote where a vote is required, but a tie vote, when they are of an even number, is no vote, or rather is not a majority and can have no effect as such. That is to say, a proposition upon which the vote is a tie is not carried. The application of this principle to the finding and sentence will be illustrated hereafter.

Mode of Voting. As to the manner of voting the only provision of the written law is that of Art. 95, that:—"Members of a court-martial, in giving their votes, shall begin with the youngest in commission," *i. e.* the junior member. The main object of this provision, which, taken from the then existing British code,[1] first appeared in our original Articles of 1775, appears to be to secure the members junior in rank from being influenced in their opinions by the views of their seniors. "In no other way," observes Clode,[2] "could this freedom be secured." The form and rule of voting which usage has prescribed in deliberating upon the Judgment will be noticed in a subsequent Chapter.

The Members to Act as a Unit. Whatever may be the personal opinions of individuals, and however slight may be the majority by which a result is arrived at, the members in their decision and action must be and appear as a unit. That this is required is but an illustration of the principle that all military action must, as far as practicable, be summary, final and conclusive. Thus a ruling upon a plea or exception is the ruling not of such members as have concurred in it, or of such a majority, but of the court; a finding is the finding of the court, a sentence is the sentence of the court—as a unit. The law ignores differences of opinion—majorities or minorities—*in the result*, and even prohibits the disclosure of the votes and opinions by which such result has been attained. With the civil tribunals a majority of the judges pronounce the judgment of the court, but who constitute the majority is made known, and the minority may, and often do, express their dissenting views.[1] With military courts all dissent is merged and lost in the conclusion reached, whatever it may be, of the court, which thus, to the parties, the public and the readers of its record, appears as an integral and indivisible whole. In view of this principle, no act performed by a part of the court can be legal,[2] nor can an individual member be permitted to take any official action independently of or counter to the court. Thus a member or members cannot legally enter upon the record a *protest* against a ruling or judgment of the majority, *i. e.* the court, even though the same may be in fact erroneous or unjust. So, the president or a member cannot, on a revision, correct an error in the recorded proceedings, but the correction must be made as the act of the court. Individual members may make, independently or in combination, a recommendation to clemency, but this is because the same is a *personal* act, not an official proceeding of the court. These illustrations of the general principle will be separately recurred to hereafter.

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[1] See Art. VII of Sec. XV, of 1765, in Appendix. Its original is found in the "English Military Discipline" of James II. See Appendix.

[2] Mil. Law, 150. And see, to a similar effect, 2 McArthur, 259; Tytler, 151–2; De Hart, 175.

Not to Assume Incompatible Functions. Status as a Witness. For example, a member, while acting as such, cannot, at the same time, properly act—even temporarily and briefly—as judge advocate, in recording the proceedings or otherwise.[3] Nor can he, while remaining, *i. e.* without being duly relieved as, a member, act as counsel for the accused.[4] He may indeed, without affecting the legality of the proceedings, testify as a *witness*, even where there are including himself but five members present, since, in so doing, he is not disqualified as, and does not cease to be, a member.[1] But, except when called to testify merely as to character, it is most undesirable that a member should be placed in the position of a material witness upon a trial where he is to act as a judge. In this connection Gilchrist[2] observes:—"If it is ascertained previous to the assembly of the court, that the evidence of an officer nominated on a court-martial is required, he should be immediately relieved; and if a member, after taking his seat and being sworn in, is called on to depose to facts, justice demands that he should not resume his seat as a member, to decide on evidence he has himself given." So, in a General Order during the late war,[3] the appearing as a witness by a member is disfavored "for the reason that the facts to which he deposes must to some extent be colored with his opinions," and because, when he resumes his seat, he will have "to decide between the degrees of credit to be given to the testimony of other witnesses as compared with his own." But some exigency of the service, or the fact that a small number of officers are available for court-martial duty, will now and then prevail against considerations of this character, and require that an officer personally informed of the facts of the case to be tried should be placed upon the detail and remain upon the court.[4] In such a case it is better that the officer should testify openly as a witness on the stand subject to cross-examination than that he should be exposed to the temptation of communicating his knowledge to his fellow members in closed court—a proceeding wholly condemned at military law.[1]

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[1] So, where *juries* disagree, the numbers on either side are commonly (though generally irregularly and improperly) made public.

[2] See Simmons § 530.

[3] See G. O. 2, Dept. of the Platte, 1868.

[4] G. C. M. O. 62, 1874; G. O. 134, Dept. of the Mo., 1863; Do. 119, Id., 1867; Do. 29, Dept. of the Lakes, 1870.

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[1] DIGEST, 496, 750–1; Sullivan, 58; Simmons § 511, 947; Clode, M. L., 127–8; G. O. 11, Dept. of the N. West, 1864. And compare People *v.* Dohring, 59 N. Y. 374, 377, where, one of the judges necessary to complete the court having testified as a witness at the trial, it was held that—his "mere absence from the bench, while he was in the witness-box, did not affect the jurisdiction of the court." On Gen. F. J. Porter's trial, Brig. Gen. King, a member of the court, testified as a witness on the merits for the prosecution, without objection by the accused. Printed Trial, p. 203–205. On the trial of Lieut. Devlin of the Marine Corps, in 1852, three of the nine members of the court testified as witnesses on the merits.

[2] Duties of a Judge Advocate, p. 9.

[3] G. O. 11, Dept. of the N. West, 1864.

[4] That is to say, if not challenged off, as he properly may be if his knowledge has in fact prejudiced his mind. See Chapter XIV.

Absence of Member from Court. The detailing of an officer as a member of a court-martial is an *order* requiring him to attend and act as such: moreover when an officer has been so detailed for a trial, the accused has a certain right to his presence, if not duly excused or prevented by some sufficient cause from attending.[2] It is clear that a member cannot declare himself to be ineligible, or on any other ground excuse himself from attending;[3] and further that, if not formally relieved by a proper superior, or regularly excluded upon challenge, he can be excused only by illness, or some stringent and for the time insuperable casualty or emergency.[4] When prevented from attending by sickness or other controlling cause, the member is required by the usage of the service to communicate to the president or judge advocate the cause of his absence, so that the same may appear explained upon the record.[5] If the absence is occasioned by sickness, the officer should forward a proper medical certificate in reference to the same, and this should be appended to the record.[1] A court-martial may in general properly adjourn for a short interval to await the recovery of a member temporarily indisposed.[2] A member absent at the organization but coming in on a subsequent day should see to having himself sworn[3] and to his being made subject to challenge.[4]

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[1] Simmons § 947; Griffiths, 112; Maltby, 68. That a *finding* cannot legally be based upon the individual knowledge of a member—see Chapter XIX.

[2] See G. O. 4, Div. Atlantic, 1874.

[3] See G. O. 66, Dept. of the Platte, 1871; G. C. M. O., 12, Dept. of Arizona, 1893. In a case in Do. 2, Dept. of Texas, 1894, where one member excused himself from attending the court on a certain trial, on the ground that he had other more important official business to attend to, and another that he desired to be present at the payment of his company, their action was properly emphatically condemned by the Department Commander.

[4] G. O. 60, Dept. of the Platte, 1871; G. C. M. O. 4, Dept. of Cal., 1890; Do. 2, Dept. of Texas, 1894; Circ. No. 12, Dept. of the Columbia, 1890. That a member was attending a post council of administration has been held an insufficient excuse, for the reason that the attendance on the general court-martial, enjoined as it was by a superior commander, was a paramount duty. G. O. 10, Dept. of the Lakes, 1867. So it was held an insufficient excuse that the member was engaged on "other duty at the post," since a post commander, unless in some exceptional emergency, is not authorized to place or retain officers on duties interfering with their due attendance on general courts. G. O. 106, Dept. of Dakota, 1871. And see other cases of insufficient excuses in G. C. M. O. 29, Dept. of Texas, 1884; Do. 30, Dept. of Dakota, 1886; Do. 16, Dept. of the Mo., 1887; Do. 6, Id., 1888. If his duties on the court will seriously interfere with his other duties, the member should apply to the proper authority to be relieved.

[5] DIGEST, 494; Simmons § 526; G. O. 50, Dept. of the East, 1863. It is not sufficient to *record* that the cause of absence is "unknown,"

An obligation to explain his absence—the cause of his detention—rests also upon a member who attends the court at a late stage of a session, or after having failed to be present at a previous session. As already indicated it is the duty in such a case of the presiding officer to call upon the member for the explanation due, and if he refuses to give one, or gives a frivolous or insufficient one, he becomes—upon the facts being reported to the convening authority—amenable to a charge for the offence involved.[5]

The *Court* has of course no authority to permit or excuse an absence by a member, except upon a challenge duly made and allowed under the 88th Article of War.[6]

Return of Absent Member as affecting Legality of Proceedings. The question has been considerably discussed whether a member who has been absent during a material portion of a trial may legally return and resume his seat. In the majority of the treatises it has been declared that, where evidence has been received during the member's absence, he cannot be permitted to return and act as member without invalidating the judgment of the court.[7]

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where the same may be readily ascertained by the court. G. O. 8, Dept. of the Gulf, 1873.

[1] See G. O. 44, Dept. of the Platte, 1871.

[2] Simmons § 526. Hough, (P.) 712, mentions a case in which, a member being sick, the court assembled at his quarters.

[3] G. C. M. O. 29, Dept. of the East, 1893.

[4] G. C. M. O. 25, Dept. of the Colorado, 1893.

[5] The law on this subject is pointedly illustrated in a case in G. C. M. O. 29, Dept. of Texas, 1884.

[6] See Chapter XIV.

[7] Hough, 666; Simmons § 530; Franklyn, 46; Tulloch, 54–5; Jones, 72; Gorham, 35; O'Brien, 260; De Hart, 92. And see, to a similar effect, 2 Opins. At. Gen., 414; 4 Id., 7.

In this country, however, the military practice has not in general accorded with this doctrine. In 1814, upon the question being raised in the leading case of the trial of Brig. Gen. Hull and submitted to the Secretary of War for decision, it was formally held by him that a member who had been obliged to absent himself for an interval from the court could properly return and resume his functions, providing the proceedings had and evidence taken during his absence were read to him as recorded.[1] In consequence of this ruling, a member who had been absent on account of illness for four days on each of which evidence was introduced for the defence, was, with the assent of the accused, re-admitted to the court,—the testimony received in the interim being first read to him,—and continued on the court to the close, taking part in the findings and sentence of death. On Capt. D. Porter's trial in 1825,[2] when on two occasions a member became sick and unable to attend, the court proceeded with the case with the express understanding, concurred in by the accused, that when the member returned, (as in each instance he did,) the proceedings had during his absence should be read to him from the record. On Com. Mackenzie's trial in 1843,[3] a member who had been absent for two days during which no testimony had been received was re-admitted; but the same member, having subsequently been absent sick for three days during the taking of evidence, it was decided by the court on his return that he should be "excused from further attendance." One of the charges in this case—it is to be remarked—was "murder." On Com. Wilkes' trial in 1864,[4] two members who had been absent on account of illness during the hearing of testimony returned and resumed their seats without objection, the proceedings had and evidence received meanwhile being read to them. In the case of one of them the testimony was read in the presence of the two witnesses who had testified in the interim, they pronounced it correctly recorded, and the member declared that he had no questions to put to them. On the trial by military commission of Dodd and others in Indiana, in 1864,[5] wherever members were absent through sickness or other unavoidable cause, the trial was, with the consent of the accused, proceeded with; the members, with the same consent, subsequently resuming their seats and having read to them the testimony introduced in their absence. In Capt. Downing's case, where a member who had been absent for two days on account of illness was not permitted by the court to resume his seat, the opinion was expressed, (in 1855,) by Atty. Gen. Cushing,[1] that the court had no such power to exclude the member, and that "whether the absent member shall act or not upon his return must depend upon his own views of propriety and not upon those of the court."

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[1] Printed Trial, Ap., p. 29.

[2] Printed Trial, pp. 367, 376.

[3] Printed Trial, pp. 9, 107.

[4] Printed Trial, pp. 136, 145.

[5] Printed Trial, pp. 9, 73.

In our present practice, members who have absented themselves during the hearing of testimony retake their places in general without objection; and that their action does not affect the validity of proceedings or sentence, (provided five members have meanwhile been present,) is believed not now to be questioned. Such action, however, (which is indeed of rare occurrence,) is irregular and certainly not to be encouraged;[2] and Mr. Cushing, in the opinion last cited, has noted how much less satisfactory it must in general be to hear testimony read than to receive it from the witnesses in person, observing at the same time their manner and bearing. Where indeed there is reason to believe that such action may have resulted in any injustice or material disadvantage to an accused party who has been convicted, the fact will properly induce a disapproval of the findings and sentence or a mitigation of the punishment adjudged.[3]

Introduction of a New Member Pending the Trial.

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[1] 7 Opins., 98, 102, 103.

[2] See G. O. 78, Dept. of the Cumberland, 1867; G. C. M. O. 80, Div. of the Pacific, and Dept. of Cal., 1880.

[3] DIGEST, 495. In repeated cases of trials during the war, in which members who had been absent during the hearing of material evidence were re-admitted, to participate in the trial and judgment, and it did not appear that the accused had assented to such re-admission, the proceedings were disapproved by the reviewing authority. See G. O. 91, Dept. of the Ohio, 1864; Do. 36, Mid. Mil. Dept., 1865; Do. 66, Dept. of the Platte, 1871; Do. 2, Id., 1868; Do. 5, Dept. of N. Mexico, 1862; Do. 86, Dept. of the South, 1864; Do. 44, Dept. of the East, 1865; Do. 13, Id., 1866; Do. 107, Dept. of the Mo., 1863; Do. 76, Second Mil. Dist., 1868; Do, 54, Fifth Id., 1870. In most or some of these cases the action taken was probably induced by a consideration of possible injustice done the accused.

The above-cited ruling of the Secretary of War on Gen. Hull's trial covered also the case of a *new member* who, it was held, could be added to the court in the course of the trial, without affecting the validity of the subsequent proceedings, provided he were made acquainted with the proceedings had prior to his introduction. No new member was actually detailed on this trial. The ruling, however, has been recognized in our practice as authorizing the convening authority to add a member or members to the court pending the trial, where necessary to prevent a failure of justice by reason of the court, in an important case, being reduced by some casualty below five.[1] This subject has already been remarked upon in the Chapter on the Composition of General Courts.

Change of Rank or Status of a Member while on the Court. That an officer is promoted while acting as a member of a court-martial affects in no manner his capacity on the court. The *fact* is properly noted in the record, and may perhaps give the officer precedence over another member or members and thus change his seat, but this is all. And the effect is similar of an appointment of a member to another office, though of the same rank, or of his transfer to another branch of the service;—no such change can, *per se*, modify his *status*, nor will he cease to be a constituent of the court till duly relieved by competent authority.[2]

If a member of a court-martial receives notice that he is retired, or is dismissed or discharged from the service, or that his resignation has been accepted, the fact should be at once noted on the record and the member should thereupon vacate his seat. A retired officer is not eligible to sit upon a court-martial, and an officer, upon being dismissed or discharged, or upon his resignation taking effect, becomes forthwith a civilian.[3]

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[1] As to the undesirableness of such a measure, where it can be avoided consistently with the interests of the service, see DIGEST, 321; G. C. M. O. 9, Dept. of Texas, 1883. In the General Orders, while the introduction of new members has been treated as an irregularity, it has not in general induced a disapproval of the sentence, except where it did not appear from the record that the member had been made acquainted with the evidence taken before his appearance. See G. O. 99, Army of the Potomac, 1862; Do. 46, Dept. of the East, 1864.

[2] See G. C. M. O. 12, Dept. of Arizona, 1893.

[3] DIGEST, 495. In G. O. 104, Dept. of Ky., 1865, the proceedings in fifteen cases are disapproved for the reason that a member of the

Behaviour of the Members. It is quaintly announced in Art. 87, that—"All members of a court-martial are to behave with decency and calmness," a directory provision dating back in our law to the Articles of 1775, which derived it, in substance, from Art. 48 of the Code of James II. It will be of course for the president, "the organ of the court to keep order," to require an observance of this Article in the first instance.[1] A member who fails to behave with decency and calmness, *i. e.* behaves in a disorderly and disrespectful manner, especially after a warning from the president, though not liable to be proceeded against as for a contempt under Art. 86,[2] will of course be subject to charges under Art. 62 or Art. 61, and this indeed independently of the provision of Art. 87. In a few cases published in Orders, members of courts-martial have been tried for drunken and disorderly conduct and disrespectful language in the presence of the court, and severely sentenced.[3]

Their Course upon the Investigation. While the members may, and in practice not unfrequently do, not only put questions to the witnesses for the purpose of bringing out facts or elucidating the issue, but also take exceptions to questions proposed in the course of the examination, it is not compatible with their function as judges to assume a controversial attitude or anything like an active part upon the trial. In a recent case in the Department of Dakota, it is remarked by Gen. Terry, that "members of courts-martial are not of counsel either for the government or the accused, and it is no part of their business to try a case as such counsel," and that therefore "the frequent interposition of objections by members of a court is a vicious practice and should be discountenanced."[4]

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court acted thereon for part of a day, after having received notice of his muster out of service.

[1] See Hough, 375.

[2] G. O. 14 of 1850; Army Regulations, par. 1006.

[3] See G. O. 1 of 1858; Do. 66, Dept. of the Mo., 1866; G. C. M. O. 9, Fourth Mil. Dist., 1867. That members should not commit the disorder of vacating their seats before the president has announced that the court has adjourned, is noticed in G. C. M. O. 55, Dept. of the Mo., 1884.

[4] G. C. M. O. 142, Dept. of Dakota, 1881; Do. 49, Id., 1883; also Do. 71, Dept. of the Platte, 1890.

Special Obligation of Members on being Sworn. The obligations devolved upon members of courts-martial on taking the oath prescribed by Art. 84 will be considered in Chapter XV.

Personal Liability of Members. The *civil* liability of members to persons aggrieved where the court has proceeded without jurisdiction or otherwise illegally, or has imposed an illegal punishment, is a subject which will be considered in PART III of this work.

As to liability to *military* arrest and charges—the fact that an officer has been detailed and is acting as a member of a court-martial exempts him, as already noticed, in no manner from either. Indeed, an officer who by the commission of a substantial military offence has made himself liable to arrest and trial should not be allowed to remain on court-martial duty. If it can be avoided, however, an officer should certainly not be placed in arrest while sitting upon the court as a member: the proceeding of arrest should be deferred till the close of the day's session or at least to a recess of the court.

Liability to Perform other Duty while Members. This subject, so far as respects the liability to duty of members of general courts, assembled at the places at which they are stationed, is regulated by par. 1003, Army Regulations, (as amended by G. O. 9 of 1892.) This regulation makes them "liable to duty with their commands during the court's adjournment from day to day."[1] As to officers serving as members of courts at a distance from their proper stations, the general rule is that they are not to be regarded as subject to orders requiring them to perform other duty while they remain members. In an emergency indeed they may be so required; but in such a case the court will, in general, be dissolved or adjourned, or the member or members needed for different duties be relieved.

Authority to Recommend to Clemency. This, which is the only *personal*, *i. e.* unofficial, authority which members of courts-martial may exercise in relation to the accused, will be considered in its proper order in connection with the subject of the Sentence, in Chapter XX.

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[1] It is added—"Courts-martial will, as far as practicable, hold their sessions so as least to interfere with ordinary routine duties." And see on this subject G. O. 5, Div. Pacific, 1868.

CHAPTER XIII.

THE JUDGE ADVOCATE.

Early Use of the Term. The province of the Judge Advocate, as now understood, appears to have first become defined in the British Articles of the seventeenth century.[1] Originally known in the English law as "judge-martial," or "-marshal," his prefix of "judge" appears to have been in part derived from the fact that, in addition to his functions as law officer and prosecutor, he was invested with a judicial capacity. Grose, in his "Military Antiquities," (1786,) writes—"The judge-marshal, by some styled auditor-general, and since called judge advocate, was an officer skilled in the civil, municipal and martial laws: his office was to assist the marshal or general in doubtful cases;" and he further shows how, in superintending the administration of justice in the Army, the "judge-marshal" was himself empowered to "judge and give sentence" in certain cases.[2] So, the *Schultheiss* of the early and the *Auditeur* of the later German military law exercised a species of jurisdiction of their own; the latter official named having a vote on the court.[1] The mingling of the two capacities is indicated in the office, which appears to have existed in our colonial period, of "President Judge Advocate," to which, for example, Colonel Caleb Heathcote was appointed in 1770 by the Governor of New York. The designation of "judge advocate" is now, strictly, almost meaningless; the judge advocate in our procedure being neither a judge, nor, properly speaking, an advocate, but a prosecuting officer with the added duty of legal adviser to the court, and a recorder.

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[1] See the "English Military Discipline" of James II, of 1686; also Articles of war of Charles II, of 1666. This officer is also mentioned in the original Mutiny Act of 1689. Grose, vol. I, p. 236, note, gives a form of a commission to the "Advocate of the army, employed in Africa," which is dated Oct. 12, 1661.

[2] Vol. I, p. 235. Of the "judge-marshal" he adds, (citing Sir James Turner,)—"He ought to be a grave and judicious person who fears God, and hates vice, especially bribery. A lawyer he should be, in regard most articles of war have their rise from law, and many cases chance to be avoided in courts of war, where no military article is clear, but must be determined by the civil law, or by the municipal law of the prince to whom the army belongs; and the judge-marshal's duty is to inform the court what either of these laws provides in such cases. Some princes remit the whole justice of the army so absolutely to the judge-marshal that they give him power to punish soldiers who transgress public proclamations, of himself. * * * He may cause delinquents to be apprehended and send them to the regiments to which they belong, with direction to the colonels to call regiment courts of war. * * * All complaints, whether in matters civil or criminal, are to be brought before him; and in many of them he hath power to give

The Existing Law. The statutes which relate to the appointment, duties, powers, &c., of judge advocates of American courts-martial are the 74th, 84th, 85th, 90th, and 113th of the Articles of war, Secs. 1202 and 1203, Revised Statutes, and the Act of July 27, 1892, c. 272, s. 2, 4. Some of the details of their employment are regulated by pars. 984–986, 1008–1010, 1037–1039, 1041, 1046, 1047 and 1049 of the Army Regulations. Their function, however, is to a considerable extent determined by the usages of the service. These provisions and usages will be referred to in the course of this Chapter, the subject of which will be considered under the heads of:—I. The Appointment of the Judge Advocate; II. His Authority and Duties.

I. THE APPOINTMENT OF THE JUDGE ADVOCATE.

The Earlier Law on the Subject—Provision of Art. 90 as affected by Art. 74. The statutory law authorizing the detailing of judge advocates was confused and uncertain till

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judgment himself, without any court, and in others he hath authority to oblige colonels to do justice. * * * Differences among 'camp-followers,' or that happen between any of them and the officers and soldiers, are brought before him, and in them all, after due examination of the whole fact and witnesses, he hath power to judge and give sentence," etc., etc.

[1] Von Molitor and other German authorities noted in Chapter V. And compare the provision, as to the "Advocate of the Army," in Art. 1, (Sec. VI,) of Charles I. Another view of the term "Judge" appears to be that it was applied as substantially synonymous with *Assessor;* the Judge Advocate being regarded as present with the court in the capacity of a *quasi* judicial adviser. See Clode, M. L., 126; Id., 2 M. F., 363.

made clear by the introduction in the revised code of 1874 of a new and simple provision—in Art. 74—that, "*Officers who may appoint a court-martial shall be competent to appoint a judge advocate for the same.*" Prior to the revision, the statutory authority for the purpose was that expressed in Art. 69 of 1806, and repeated in the present Art. 90, as follows: "*The Judge Advocate, or some person deputed by him, or by the general or officer commanding the army, detachment, or garrison, shall prosecute in the name of the United States.*"

The original of this provision was the early British article:[1]—"The Judge Advocate General, or some person deputed by him, shall prosecute in His Majesty's name." This, in our code of 1776, was expressed in precisely the same terms except that, in place of the last three words, was substituted—"the name of the United States of America." The succeeding Articles of 1786 prescribed that prosecutions before courts-martial should be conducted by "the Judge Advocate," (as the Judge Advocate General was indifferently styled in the Resolutions of Congress prior to the Constitution,[2]) "or some person deputed by him, or by the general or officer commanding the army," &c.

After the adoption of the Constitution, the Act of March 3, 1797, in reorganizing the military establishment, and making provision for a single Brigadier General as the officer highest in rank in the army, provided further for a "Judge Advocate." His office, however, was discontinued by the operation of the Act of March 16, 1802, by which it was at the same time enacted that:—"*Whenever a general court-martial shall be ordered, the President of the United States may appoint some fit person to act*

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[1] See Art. VI. of Sec. XV. of 1765, in Appendix. The practice indicated by this provision appears to be still in a measure observed in the British procedure. Thus Lt. Col. Story writes, (1886,)—"At home," (*i. e.*, in the United Kingdom,) "a deputy judge advocate is ordered to attend a general court-martial, by the Judge Advocate General, who may, if he thinks fit, depute any qualified officer to officiate as deputy judge advocate at a trial. Abroad, the deputy judge advocate is appointed by the convening officer, the terms of his warrant giving him the authority."

[2] During the Revolutionary War the most important prosecutions, such as those of Maj. Gens. Arnold, Lee, Schuyler, and St. Clair, Col. Henley, Lt. Cols. Enos and Zedwitz, and Major André, were conducted by Lt. Col. Wm. Tudor or Col. John Lawrance, as Judge Advocate General.

as judge advocate, * * * *and in cases where the President shall not have made such appointment, the Brigadier General or president of the court may make the same.*" In the code of Articles of 1806, the provision of 1786 was re-enacted in Art. 69. But as there was at that date no "Judge Advocate" of the Army, this article did not substantially affect for the time the operation of the Act of 1802.

Maltby[1] cites this Act as in force in 1813. O'Brien[2] and De Hart[3] refer to it as in operation at the dates of their treatises, January and August, 1846. As late as in 1840 we find a General Order,[4] (issued from Army Headquarters,) authorizing the president of a general court to appoint the judge advocate. But meanwhile the specific officer designated in the Act as "the Brigadier General" had ceased to exist as such; and in March, 1849, the office of Judge Advocate of the Army was revived by Congress.[5] After this date the provision of 1802 became practically obsolete, the Articles of war being now treated as the source of the authority for the detailing of judge advocates for courts-martial.

There were, however, no *deputations* of judge advocates ever made by the officer appointed Judge Advocate under the Act of 1849,[6] and thenceforth the judge advocate was invariably detailed by the authority convening the court, *viz.* the President as Commander-in-chief, or the competent military commander. This usage, based apparently upon a liberal construction of the term "army" in the then Art. 69 as properly including the "department" command referred to in Art. 65,[7] had prevailed to the date of the recent revision in 1874. Meanwhile—it may be added—

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[1] Page 123.

[2] Page 353. And see Id., p. 229.

[3] Page 307.

[4] G. O. 19 of 1840.

[5] Meantime certain "division" judge advocates had been authorized by Acts of 1812, 1816 and 1818, and appointed, but their appointment did not materially modify the operation of the existing law. The last of these temporary officers were done away with by an Act of June, 1821.

[6] The author, having discovered no such deputation of record, further verified the statement in the text by a personal reference to the officer himself, the late Major John F. Lee.

[7] De Hart, (p. 307–8,) refers to the "broad interpretation" given to the existing law on this subject.

no deputations of judge advocates for general courts were ever made by the Judge Advocate General, or by any officer of the corps of Judge Advocates of the Army created by the Act of 1862,[1] and none have been made to the present time, although the provision of Art. 69 of the code of 1806, authorizing such a deputing by the "Judge Advocate" has, as already indicated, been continued in Art. 90 of the present code, above cited.

It is thus perceived that, as heretofore remarked, the present Art. 74, which is at once a declaration and an enactment of a long-prevailing usage, comprises in brief the existing law on the subject of the authority to appoint judge advocates for military courts; the provision of Art. 90 being now quite unimportant and in part obsolete.

Construction of Art. 74. The statute is simple and easy of construction. A few points, however, may be noticed under it—upon some of which express rulings have been made—as follows:

1. The Article not only an authority but a requirement. Considered by itself this article is simply an enabling statute, but considered in connection with Arts. 84 and 85, and especially the former, which prescribes the administering of the oath by the judge advocate to the members of the court, it must be construed as a requirement,—as in substance enjoining that whenever a court-martial is appointed a judge advocate shall be appointed for it. And this construction accords with the long-continued usage of the service in regard to the ordering of general courts.

2. It applies to inferior as well as general courts. But the above reasoning is equally applicable to the ordering of regimental and garrison courts, since Art. 84 requires that the oath shall be administered to the members of these courts also by the judge advocate. That judge advocates are to be detailed for *garrison* courts is also apparently contemplated in Art. 90. The Judge Advocate General, therefore, in December, 1879, held that the authority conferred by Art. 74 was not to be regarded as restricted to officers empowered to order general courts, but was equally exercisable by those empowered to order inferior courts under Arts. 81 and 82. This view was soon after adopted and announced by the Secretary of War,[1] and judge advocates have since been detailed for regimental and garrison equally as for general courts-martial, in our army.

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[1] This corps, by Act of July 5, 1884, was, with the office of Judge Advocate General, consolidated into a "Judge Advocate General's Department," comprising one Brigadier General, one Colonel, three Lieut. Colonels, and three Majors. These officers, like those of the original corps, while sometimes detailed as judge advocates of general courts-martial in special cases, have other and various functions as the law-officers of the Army; being assigned to duties as Judge Advocates of Departments, as Assistants to the Judge Advocate General, and as Professor of Law at the Military Academy.

3. By whom the authority may be exercised. It is the effect of the Article that the judge advocate is to be appointed, (as in practice he *is* appointed,) by the commander who, (being thereto empowered by the Articles of war,) convenes the court-martial. By the almost invariable usage of our service the court is ordered and the judge advocate appointed in and by the same Order. The authority to detail the judge advocate cannot be delegated to or assumed by an inferior or other commander. At an early period—between 1821 and 1838—a practice, imitated from the British service, prevailed in our army, of delegating, in Orders from the War Department, (or Headquarters of the Army,) appointing courts-martial, to the commander of the post at which the court was to assemble, the authority to select and detail the judge advocate for the same.[2] But such practice, which was without warrant in the Articles of war, has been long since discontinued, and at present the members and the judge advocate are invariably alike detailed, by the officer ordering the court; nor would a commander of less authority be empowered to relieve a judge advocate so detailed or to appoint a new one. Thus, in a case in 1863, where an inferior ("District") commander to the Department commander who ordered the court, detailed a judge advocate for the same, in the absence of the judge advocate originally appointed by his superior, the proceedings were disapproved by the latter as reviewing authority.[1]

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[1] In G. O. 15, of February, 1880, since declared by the same authority to be mandatory in its terms. See DIGEST, 296, note.

[2] The last order of this kind noted by the author is dated March 25, 1838. In most of the cases the court was ordered to meet at West Point; in the others at Fort Monroe, Fort Leavenworth, or Jefferson Barracks. The delegation, by the same class of Orders, of the authority to detail also *members* of the court, has been noticed in a previous Chapter.

Nor of course can the *court* appoint a judge advocate, even for a temporary purpose. Thus it was held by the Judge Advocate General[2] that a court-martial was not empowered to direct its junior member to act in the place of the regular judge advocate where the latter had been relieved in the course of a trial without a successor being appointed. In a similar case in the Department of the Platte,[3] where a court had assumed to appoint one of its members judge advocate on the occasion of the one appointed in the convening order being temporarily called to take the stand as a witness, the proceedings and sentence were disapproved by the Department commander.

4. *Extent of the authority.* The authority conferred by the Article is not exhausted by the detailing of a judge advocate for the court at the outset. The judge advocate originally appointed may be prevented by illness from continuing the prosecution, or by reason of his promotion, or some exigency or incident of the service, other duties may properly be devolved upon him. In any such case the officer by whom he was appointed, (or his successor in the command,) may relieve him and appoint another in his stead,[4] and this proceeding may if necessary be repeated.[5] That the judge advocate cannot relieve *himself* from any part of his duty need hardly be added.[6]

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[1] G. O. 70, Dept. of the Mo., 1863.

[2] DIGEST, 317, 456.

[3] G. O. 2 of 1868. And see an almost identical case in G. C. M. O. 27, Navy Dept., 1882.

[4] DIGEST, 456; Simmons § 532; Hough, (P.) 706–7; Clode, M. L., 126; O'Brien, 260.

[5] In a case published in G. O. 54, Dept. of the East, 1864, it is noted that three judge advocates officiated successively during the trial.

On the other hand, the same officer may be appointed as judge advocate for a number of successive or different courts-martial, provided he be detailed anew in a separate order for each separate court. DIGEST, 296.

[6] That the judge advocate cannot, even with the concurrence of the court, excuse himself from officiating—a point now too well established for discussion—was in substance ruled at the trial of Gen. Wilkinson, in 1815, where the judge advocate having "begged leave, with the

5. *Eligibility for appointment as judge advocate.* There is nothing in the present Article or elsewhere in the code to preclude the employment of enlisted men as judge advocates;[1] the usage of the service, however, has sanctioned the appointment as such of commissioned officers only.

Under the general terms of Art. 74, an officer of any corps or branch of the service, whether of the line or staff, may be detailed as a judge advocate. While judge advocates are more commonly selected from officers of the line, it is by no means unusual to detail staff officers as such at remote posts or where the command is supplied with but a limited number of line officers. Under such circumstances, assistant surgeons especially have been thus employed,[2] and the corps of post chaplains, (though its members are legally eligible therefor,) is the only one from which such details are not from time to time made. As already indicated, officers of the Judge Advocate General's Department of the Army are sometimes resorted to for the conduct of prosecutions of unusual importance.

Nor does the *rank* of the officer affect his eligibility under the Article.[3] A general officer may as legally be appointed a judge advocate as may a lieutenant. Except, however, in the rare cases in which the Judge Advocate General or a Deputy Judge Advocate General officiates, the rank of the officer detailed as judge advocate is not usually above that of major.

6. *A civilian may be appointed.* The Article simply authorizes the appointment of "a judge advocate," without specifying whether or not he shall be a military person,[4] and that

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permission of the court, to decline" to undertake the responsibility devolved upon him, it was held by the court "that it was his duty to proceed with the trial."

[1] The most recent recorded instance known of an enlisted man acting as judge advocate is that referred to in Joint Resolution, No. 20, of March 3, 1855, where Congress makes an extra allowance to a private soldier of a regiment of Tennessee Volunteers employed in the Seminole war, "in full satisfaction for his services as judge advocate in the regiment in said war."

[2] The practice of employing medical officers as judge advocates dates from an early period in our service. See cases in G. O. 14 of 1832; Do. 57 of 1822; Do. 62 of 1821.

[3] A commissioned officer *without rank*, as a professor of the Military Academy, would be legally eligible.

[4] So Art. 90 simply indicates him as "some person."

he may legally be a civilian has been uniformly held.[1] In the British service the Judge Advocate General and Deputy Judge Advocate General, who formerly officiated at the principal trials by court-martial within the kingdom, are civilian lawyers.[2] Under the present Rules of Procedure[3] the judge advocate of a general court is required merely to be "a fit person," and while he is in general an officer of the army, it is recognized that he may be a civilian.[4]

In the American military service the judge advocates of courts-martial have from the beginning been, with few exceptions, officers of the army. The "division" judge advocates appointed under the Acts of 1812 and 1816 were civilians with major's pay, but these were superseded by military officers in 1818. In some of the earlier cases a "special judge advocate," who was a civilian lawyer, was designated to act in connection with the regular judge advocate; and in this capacity Hon. Martin Van Buren, (afterwards President of the United States,) was appointed for the trials of Brig. Gen Hull in 1813[5] and Maj. Gen. Wilkinson in 1815.[6] Between 1818 and the period of the late war,[7] as also during the continuance of the war,[1] the employment of civilians as judge advocates was of rare occurrence.

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[1] DIGEST, 457; De Hart, 99, 316; Benét, 244; Coppée, 57.

[2] 2 Clode, (M. F.) 362, 364; Hughes, 5; Gorham, 37; Jones, 63. The Judge Advocate General is a member of the existing Ministry and a Privy Councillor. See Manual, 198.

Outside of Great Britain the officiating judge advocates were usually military officers. Hughes, 180; Jones, 64. At trials under martial law, civilians were not unfrequently selected; as at Rev. J. Smith's trial in Demerara, 1823. Simmons (§ 462, note,) states that—"On the trial of the Canadian rebels by martial law, in 1838 and 1839, three persons, one officer and two civilians, were 'jointly and severally' appointed to the duty of judge advocate."

[3] See § 99. (A.)

[4] Manual, 544.

[5] For this trial there was also detailed a civilian as "Assistant Judge Advocate."

[6] At a previous trial of Wilkinson in 1811, Walter Jones, District Attorney for the District of Columbia, officiated as "acting judge advocate," without objection; as also, as "judge advocate and recorder," on a still earlier court of inquiry in 1808.

[7] By the Act of Feb. 18, 1832, c. 19, a special appropriation of thirty dollars is made for the services of a civilian named, as judge advocate on a certain trial "before a court-martial ordered by Gen. Wilkinson during the late war."

In our *naval* service, on the contrary, the judge advocates officiating at trials within the United States were, in general, up to a recent period, counsellors at law.[2] Since the passage, however, of the Act of June 22, 1870, by s. 17 of which, (now Sec. 189, Rev. Sts.,) was transferred to the Department of Justice the authority to employ counsel for the executive departments, neither the Secretary of the Navy nor the Secretary of War has been authorized to retain at the public expense a civilian lawyer to act as judge advocate of a court-martial.[3] Thus while the employment of a civilian in this capacity is as *legal* as ever, resort will rarely be had to one, and only in some important and difficult case requiring, for its efficient prosecution, special professional skill and experience. In such a case the Secretary of War, (or the Secretary of the Navy,) will properly call upon the Attorney General, as the head of the Department of Justice, to employ a lawyer to act either as judge advocate, or preferably as counsel to *assist* the regular military (or naval) judge advocate in the conduct of the trial.[4]

Limit of the Authority of Appointment. No person other than the official judge advocate can be detailed or can act as judge advocate. This—a point now beyond question, since the existing law clearly makes provision for but one judge advocate—was substantially held in 1814 in Maj. Gen. Wilkinson's case, in which, as already noticed, Martin Van Buren, then a civilian lawyer, was appointed to act as "special judge advocate" in addition to the "army judge advocate." The accused having objected in writing to his appearing in the case, it was ruled by the court that he could not legally do so, and he retired. This action is the more marked for the reason that he had acted in a similar capacity on the trial of Brig. Gen. Hull in the preceding year, and without objection. In a case tried during the late war in which the proceedings were authenticated only by an officer designated as "assistant judge advocate," it was held by the reviewing authority that a sentence certified by such an officer could not be executed, and the proceedings were disapproved.[1] But the rule under consideration does not preclude the detailing of other officers to assist the judge advocate in an important case,[2] or the employment of legal counsel for the same purpose, since such assistants are not thus invested with any of the legal functions of judge advocates.

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[1] Two cases of distinguished civilians who acted as judge advocates at important trials in 1865, are mentioned in the DIGEST, p. 457, note.

[2] 18 Opins. 135. At foreign stations an officer of the navy has generally been detailed. Harwood, 49.

[3] This was expressly held by the Attorney General, in construing the Act in this connection. 13 Opins., 514; 14 Id., 13.

[4] 18 Opins. 135. The employment of counsel to assist in the prosecution of military cases was more frequently resorted to formerly than later or since the organization, in 1862, of a Judge Advocate General's Department in the Army. See De Hart, 318. In an early military case referred to in 2 Journals of Congress, 413, "two counsellors learned in the law" were appointed by Congress "to assist and co-operate with the judge advocate" at the trial.

Personal Qualifications for the Appointment—*1. Fitness*—*i. e.*, a proper training and aptitude for the office. As it is expressed in the act of 1802, heretofore cited, the judge advocate should be a "fit person."[3] This officer has been styled by McArthur[4] "the *primum mobile;*" by Adye[5] "the mainspring of a court-martial." "If he errs," adds the latter writer, "all may go wrong;" or, as it is quaintly expressed by Napier,[6] unless courts-martial have a properly instructed judge advocate, "they must assemble in bodily fear."[7] The question of fitness is of course a relative one. While an officer may readily make himself familiar with the routine of the prosecution of a brief and simple trial, a special training and a considerable share of legal knowledge are required properly to qualify a military man to exercise with skill and completeness the function of judge advocate in a case of real difficulty and importance.[1] To be prepared to meet all the issues that may be raised, and duly to perform all the other duties that may be devolved upon him as judge advocate, in such a case, an officer should be educated not only in the science of the military law,—including the statutory law, regulations, orders and customs, pertaining to the offences of military persons and their prosecution, trial and punishment,—but also in the general criminal law and its practice and procedure, as well as in that most essential branch of legal learning, the general law of evidence.[2]

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[1] G. O. 29, Dept. of the N. West, 1863.

[2] On the trial, in 1865, of Payne, Herold and others, (as conspirators in the assassination of President Lincoln,) and upon that of Wirz in the same year, by military commission, the judge advocate was assisted in the former case by two officers, and in the latter by one, specially detailed for the purpose.

[3] The same term is used in the present British law. Rules of Procedure, (A.)

[4] Vol. 2, p. 279.

[5] Page 113.

[6] Page 114.

[7] That is to say, "fear" lest by some error they may be exposed to suit or prosecution.

2. *Absence of Bias.* As a judge advocate is not subject to challenge, it is important that an officer strongly prejudiced for or against the accused, or who has a decided personal interest in the result of the trial, should not be selected as the judge advocate if it can be avoided. Thus, one interested in the conviction of an accused officer, for the reason that, in the event of a dismissal, he will become entitled to promotion, will not be a desirable person to be detailed as judge advocate for the trial, if any other suitable officer can be appointed without detriment to the service.[3] So, one personally inimical to the accused, or seriously at variance with him, is not a suitable person to act as his prosecutor. Where an officer appointed judge advocate is conscious of any such prepossession, bias, or interest as may materially affect the efficient, fair or courteous performance of his duty, he will properly communicate the facts, in a respectful manner, to the appointing authority, and ask to be relieved.[1] But prejudice or interest, however conspicuous or controlling, on the part of the judge advocate, cannot of course impair the *legal validity* of the proceedings.

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[1] "His qualifications of course must be *of the sort* required by members of the bar." 18 Opins. At. Gen., 137.

[2] On the subject of the qualifications of a judge advocate, compare Hughes, pp. 9–19, 178, *et seq.* And see Grose, Vol. I, p. 235, cited *ante*, p. 262.

[3] In G. C. M. O. 5, War Dept., 1871, in connection with the action of the President upon the case of a Captain of the army, it was remarked as follows: "In his review of this case, the Judge Advocate General calls attention to the fact that the Judge Advocate of the Court was not only a material witness for the prosecution, but, as senior first Lieutenant in the same regiment with accused, was the expectant of promotion to the next vacancy in the grade of Captain. In view of this fact, while there is no ground for doubting that the officer charged with this duty performed it with honest and pure intention, yet certainly his selection for it was unsuitable, inasmuch as by military law and usage it has always been held that the Judge Advocate should be free from personal bias or interest in the result of the proceedings in which he officiates."

II. HIS AUTHORITY AND DUTIES.

This subject will be considered under the heads of: The authority and duty of the judge advocate—(1) Prior to the meeting of the court; (2) Pending the proceedings and trial; and (3) After the completion of the proceedings.

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[1] In G. C. M. O. 41 of 1875, in a case of a soldier tried upon a charge of having made a false complaint that an officer had improperly assaulted him, which officer was judge advocate of the court and prosecuting witness, it was remarked as follows: "It was not contemplated that a prisoner would be brought to trial before this Court on charges which raised the question whether its Judge Advocate had not himself been guilty of official misconduct. But such was the fact in this case. The Judge Advocate had a personal interest in the conviction of the prisoner, and was also the principal witness against him. Under such circumstances he should have applied to the proper authority to be relieved from duty as Judge Advocate. The proceedings are disapproved." In a case published in G. C. M. O. 18 of 1886, the attitude of the judge advocate is commented upon by the President as follows—"The judge advocate was manifestly disqualified and incapable of properly discharging his duties of judge advocate because of the interest which he took in the conviction of the accused. For this reason he should have requested relief from a duty which he could not perform in justice to himself, the accused, and the service." In a later case promulgated in G. C. M. O. 1, Div. of the Mo., 1890, reference is made to the officiating by an officer as judge advocate on the trial of a soldier, whom he had himself abused and assaulted, as follows—"Lieut. S. committed an unfortunate mistake in acting as prosecutor on the trial of a soldier with whom he had had a personal difficulty. * * * Although the judge advocate of a court-martial is not one of the judges who try the cause, and although there is no provision of law for the challenge of a judge advocate by the accused, yet a nice sense of propriety and due appreciation of self-interest should suggest to an officer the wisdom of requesting to be excused from the duty of prosecutor under such circumstances. Such a request would of course be respected by the commanding general who appointed the court."

AUTHORITY AND DUTY OF THE JUDGE ADVOCATE PRIOR TO THE MEETING OF THE COURT.

As to Preparing or Perfecting the Charges. While in the ordinary criminal procedure the indictment is almost invariably framed by the prosecuting attorney,—in the *military* service, where any officer may prefer charges, the judge advocate of the court has a comparatively limited control over the form of the charges and specifications. He has no *original* authority, *virtute officii*, to entertain charges in the first instance, but can simply act upon such as are transmitted to him to prosecute. In the absence, therefore, of general instructions or specific authority for the purpose from the superior by whom he has been appointed, he cannot, as a general rule, make any material amendments in the pleadings as committed to him.[1] In some instances indeed, where the court was convened for the trial of enlisted men for light or simple offences, the papers have been transmitted and witnesses referred to the judge advocate, with instructions to frame, serve, and prosecute formal charges in the several cases, as the proofs may appear to warrant.[2] But in general, and especially in the more important class of cases, the charges will, regularly, have been prepared by the immediate commander of the accused or the original accuser, and revised by the Commander who is to convene the court, or the officer of the Judge Advocate General's Department or Acting Judge Advocate on his staff, or by the Judge Advocate General, before they reach the judge advocate of the court. In such cases, while the judge advocate may correct obvious errors of form and mistakes in names, dates, amounts, &c., known to him, from having communicated with the witnesses or otherwise, to be incorrect,[3] he cannot properly venture upon material amendments of substance. and certainly cannot assume of his own authority to reject any charge or specification, or to add a new one.[1] Where indeed the judge advocate of the court is an officer in whom a special confidence is reposed, as where he is the Judge Advocate or Acting Judge Advocate of the Department, &c., he may assume a larger discretion in the matter of amending the charges before trial, especially where he has already had to do with their preparation or revision. But in general, in the absence of some special authority or direction from the convening commander, the charges should remain substantially intact in the hands of the judge advocate, who should consider himself simply as a subordinate under orders to perform a particular duty, *viz.* to prosecute the particular charges committed to him by his superior. Where, from the testimony as personally examined by him, he is of opinion that a charge should be laid under a different Article from that selected, or that an additional charge or specification should be preferred, or other material change in the pleadings should be made, it will be proper for him to communicate the facts and his views to the Commander by whom he has been detailed, and await his instructions.[2]

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[1] DIGEST, 458; O'Brien, 235; G. C. M. O. 42, Dept. of the Platte, 1877; Do. 7, Dept. of Texas, 1882; Do. 9, Dept. of Arizona, 1884.

[2] This was sometimes done during the late war, but, as a practice, belongs rather to the past, and to the period before department, &c., commands were furnished with staff judge advocates. In some of the old Orders the judge advocate was specifically directed to prepare the charges after conference with the original accuser, who had not duly formulated the same. See instances in G. O. of Aug. 10, 1819, and Sept. 7, 1820.

[3] See G. O. 25, 36, Dept. of the Mo., 1867; Do. 11, Dept. of the Gulf, 1865; Do. 64, Dept. of Ark., 1865; Do. 17, Dept. of Fla., 1866, Do. 26, 29, Dept. of La., 1868; Do. 35, Fifth Mil. Dist., 1868. A

As to Serving the Charges, &c. The subject of the service of charges has already been considered in treating of the Charge. The service of the charges is a duty usually devolving upon the judge advocate, and should be performed as soon as practicable after the charges have been perfected, or within a reasonable time

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larger authority, however, is attributed to the judge advocate in some of these Orders than would be quite warranted in time of peace. In G. C. M. O. 17, Dept. of the Colorado, 1894, it was held that the judge advocate, after having conferred with the witnesses, was justified in making the charge, erroneously expressed in the alternative, more certain, by striking out matter which was merely surplusage.

[1] DIGEST, 458; G. O. 3, Div. Atlantic, 1876. That he cannot do this even with the concurrence of the court is remarked in G. C. M. O. 36, Dept. of the Platte, 1877.

[2] "It is a part of the duty of an officiating judge advocate to represent to the officer convening the court any error or omission in the charge, and thereby to anticipate or obviate any delay in the assembly of the court." Simmons § 414. And see De Hart, 313; G. O. 30, Dept. of the Mo., 1867. It is a part of his duty not to go to trial upon a defective indictment, (G. O. 11, Dept. of the Gulf, 1865; Do. 29, Dept. of La., 1868,) if the defect can be duly corrected.

before the trial. A list of the witnesses for the prosecution will properly accompany the charges. The accused will also properly be supplied with a copy of the Order detailing the court, so that he may have a reasonable opportunity to consider whether he will interpose challenges to any of the members. Where the Order does not specify the time or place of the particular trial, the judge advocate should notify the accused of the same. He should also promptly furnish him with copies of amended or "additional" charges or specifications, if any such are introduced.

As to Summoning, &c., the Witnesses. It is directed by par. 1008 of the Army Regulations that the judge advocate "summon the necessary witnesses for the trial;" and, in order that the trial may not be delayed, it is in general his duty at this stage of the proceedings to summon the material witnesses, both those required for the prosecution[1] and those whose names are furnished him by the accused, who is entitled to have summoned for him his material witnesses.[2] If papers in the possession of a witness are required to be used in evidence, the judge advocate will issue to him a subpœna *duces tecum*, specifying the particular writings. Where any witnesses are so distant, or otherwise situated or occupied, that their personal attendance cannot probably be procurred without extraordinary expense, or embarrassment to the service, he will properly submit to the convening authority the question whether they shall be summoned to appear in person or required to give their depositions. If directed to procure their depositions, he will proceed to do so by preparing in concert with the accused the necessary interrogatories and forwarding the same through the proper channels, subject to the provisions of the 91st Article of war.[1] Where not satisfied as to the materiality of a proposed witness, or where the testimony of such a witness will be merely cumulative, he may omit or decline to summon him till requested or instructed to do so by the court or the commander.[2] Where the accused desires the attendance of a witness whom the judge advocate does not think it worth while to summon, the latter may well offer to *admit* in writing at the trial that the person, if present, would testify thus and so. Forms of subpœnas for witnesses, to be issued by the judge advocate, are given in the Appendix.

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[1] That it is, in general, the duty of the judge advocate, though it may not always be necessary, to summon, (and call to testify on the trial,) the witnesses *whose names have been appended to the charges*—see G. C. M. O. 135, Dept. of Dakota, 1882; Do. 45, Id., 1884.

In Circ. No. 9, (H. A.), 1887, the point is noticed that the judge advocate can only *subpoena* a witness to attend the court. He cannot issue a subpoena to a witness to appear before himself for examination. This must be effected by an *order*, emanating from the proper superior, as the post commander.

[2] G. C. M. O. 4, Div. of Atlantic, 1886. No persons, (except perhaps foreign ministers—see Com. Wilkes' Trial, p. 79,) can be said to be legally exempt from being summoned as witnesses on military trials. High public officials, however, will not properly be summoned where their attendance can be dispensed with without serious prejudice to the administration of justice.

Service of Summons. If the witness is at or near the place of trial, or station of the judge advocate, he may be personally summoned by the latter, or by any other officer or individual for him.[3] If he is at a greater distance, a subpœna, or application for his attendance, should generally be forwarded by the judge advocate "through the regular military channels,"[4] to the proper headquarters, in order that the proper orders may be made for his attendance, transportation, &c. The judge advocate should always cause a *civilian* witness to be *personally* served: this to facilitate the compelling of his attendance by attachment under Sec. 1202, Rev. Sts., if found necessary. A personal service will be made either by exhibiting to the witness the original subpœna and causing or enabling him to become informed of its contents, or—and preferably—by delivering to him a copy.[5] The individual making the personal service will properly be instructed by the judge advocate to certify the fact, date and place of service on the back of the original[1] and thereupon return the same to him. Witnesses, on arriving at the place of trial, should report forthwith to the judge advocate.

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[1] As to the law in regard to depositions in military cases, and their form, see Chapter XVIII., and Appendix.

The time and expense of summoning a particular witness or witnesses may sometimes be saved by the judge advocate and accused entering into a written *stipulation* that certain specified facts shall be considered as admitted in the case. See example in Lieut. Devlin's case. Printed Trial, p. 12.

[2] See par. 1008, A. R.

[3] In order to avoid possible expense, a military person should, if practicable, be employed to make the service. G. O. 34, Dept. of the Platte, 1870.

[4] See par. 1010, A. R.

[5] 1 Greenl. Ev. § 315, note.

As to Preparing the Case for Trial. The further duty is devolved upon the judge advocate of assuring himself, before going to trial, that the proper evidence is available, and is sufficient to establish the charge.[2] In this connection, it may sometimes be desirable for him to take affidavits, and for the administering of oaths in such cases he is now expressly authorized by the Act of July 27, 1890. In several instances, judge advocates have been severely censured in General Orders for proceeding with the prosecution without duly preparing their cases, or informing themselves whether the witnesses proposed to be called could establish the facts alleged in the specifications. If, after personally examining the witnesses, &c., a judge advocate concludes that he cannot make out a *prima facie* case upon the charges referred to him for prosecution, he should, if there is time, communicate the fact to the convening authority and ask instructions.

A judge advocate entrusted with the conduct of an important prosecution will also, before the trial, look carefully into such points of law—especially questions in the law of evidence—as are likely to arise in the case, and prepare himself by study for presenting or contesting the same.

As to Other Particulars. It devolves upon the judge advocate to make a requisition upon the quartermaster for the proper stationery for his own use and that of the court at the trial or trials to be had, as also for a room or rooms, or other quarters in which to assemble, (with the necessary furniture, fuel, &c.,) if such have not already been provided. At most established posts, such a room is set apart. He will also properly apply to the assistant adjutant general, post adjutant, &c., for an

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[1] See form in Appendix.

[2] See the remarks of the reviewing officers in G. O. 63, Dept. of the East, 1864; Do. 36, Dept. of the Mo., 1867. Tytler, (p. 358,) writes: "The judge advocate must instruct himself in all the circumstances of the case, and by what evidence the whole particulars are to be proved against the prisoner. Of these it is proper that he should prepare in writing a short analysis or plan for his own regulation in the conduct of the trial and examination of the witnesses." This last suggestion is repeated by subsequent writers.

orderly or *orderlies*, as may be required. If he does not exercise his statutory authority of appointing a *reporter*,[1] (or, in a case of unusual importance, though a reporter be actually appointed,) he may employ, at his own expense, a civilian *clerk*, or may apply to the proper official for an enlisted man to be ordered to report to him for duty as clerk. If an *interpreter* is necessary, he will take measures to obtain one—generally by summoning as a witness a person competent for the purpose.[2]

Where the charges or specifications are unusually numerous or extended, the judge advocate may well have the same *printed*, if practicable, for the convenience of the court upon its assembling and for reference during the trial, as also to facilitate the making up of the record.

AUTHORITY AND DUTY OF THE JUDGE ADVOCATE PENDING THE PROCEEDINGS AND TRIAL.

This Capacity in General. "The presence and assistance of an officiating judge advocate," observes Simmons,[3] "is essential to the jurisdiction of a court-martial." O'Brien[4] writes: "A court-martial cannot proceed to any business without that officer." Neither is strictly accurate. But while it is not necessary, (though certainly highly desirable and almost invariable,) that the judge advocate should be present at such preliminary action as a court may take after its first assembling and prior to the appearance of the accused, it is clear that the court cannot enter upon the *trial* without him, since, by Art. 84, he must first qualify them by administering "to each member" the prescribed oath. So, pending the trial, his presence, though it may not always be essential, cannot properly be dispensed with during any material proceeding.[5]

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[1] As to the exercise of this authority, see *post*.

[2] As to clerks, interpreters, orderlies, &c., see Chapter XI.

[3] § 462.

[4] Page 229.

[5] A judge advocate may indeed temporarily absent himself and resume his place without affecting the validity of the proceedings; (Clode, M. L., 126; Benét, 86;) though this "mars their unity," (Coppée, 60,) and, where necessitated for any longer than a very brief period, should induce a suspension of the proceedings, for the time, by the court. DIGEST, 460.

It was observed by Kennedy,[1] (who has here been repeated by later writers,) that a judge advocate "appears at a court-martial in three distinct characters," those of Prosecutor, Adviser to the Court, and Recorder; in the last of which only, the author adds, is he subject to the direction or control of the court; being authorized in the other two "to act according to his own judgment and discretion." Except that he cannot properly *obtrude* advice, this statement is substantially correct.

With these principal capacities of the judge advocate are also to be considered, as attaching at this stage to his office under our law, his province as counsel or adviser of the accused, and his authority and duty under Art. 85 and under Secs. 1202 and 1203, Rev. Sts.

As Prosecutor.—***Legal status in general.*** From an early period in the British law till 1860, the judge advocate acted as prosecutor in the name of the Sovereign before general courts-martial.[2] But that he should sustain this character, while at the same time acting as official adviser to the court, was viewed by some of the authorities[3] as unjust to the accused and inexpedient, and in 1860 it was expressly prescribed in one of the Articles of war that he "should no longer be the prosecutor."[4] A provision to the same effect is contained in the present Army Act.[5] In the British practice the prosecutor is now a separate official, quite distinct from the judge advocate.[6] He is appointed by the convening authority, "who, in the trial of a soldier, ordinarily selects the adjutant of the prisoner's regiment."[7]

In our law the judge advocate has from the beginning acted as the public prosecutor in military cases. In the articles of 1776,[8] it was enacted that the officer officiating as judge advocate should "prosecute in the name of the United States of America," and a provision to the same effect has been repeated in the code to the present time. No such agency as a "private prosecutor" is known to our law. In practice, the accuser or "prosecuting witness" is often allowed to remain in court, to enable the judge advocate to confer with him during the trial, but the law does not recognize him as having any official part in the prosecution of the charges.

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[1] Page 222. As to the change, later, in regard to the capacity of prosecutor in the British law, see *post*.

[2] Tytler, 206, 349; Adye, 115, 119–120; Samuel, 619; Clode, M. L., 116.

[3] Napier, 113; Warren, 10, 229, 232–3, 253.

[4] See Simmons § 472; Clode, M. L., 125.

[5] § 50. (3.)

[6] Story, Summary of Military Law, 65.

[7] Manual, 596; Story, 65.

[8] No judge advocate was provided for in the original code of 1775.

As sole prosecutor, the judge advocate, with us, practically conducts the trial—a function which in the British,[1] and more conspicuously in the French[2] law, is substantially devolved upon the president. In the American law, the judge advocate arraigns the prisoner; swears and examines the witnesses and cross-examines those of the defence; takes exceptions to pleas or testimony offered on the part of the accused, or to applications or propositions made by or for him to the court which he deems inadmissible or objectionable; enters into such stipulations and makes such admissions in regard to testimony, &c., as he may deem expedient;[3] and argues all exceptions taken and issues raised—in the name and as the representative of the United States. So, like the prosecuting attorney in the ordinary criminal courts, he presents, (or may present,) the closing argument on behalf of the Government.[4]

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[1] See Simmons § 430; 2 Clode, M. F., 364, note.

[2] See Alla, 216–221, 257–269. At the French *conseils de guerre* the examination of the witnesses is in general conducted by the president. In important cases, (as at Marshal Bazaine's trial,) the counsel for the accused has been allowed, by courtesy, to add questions.

[3] In a case in which the court instructed the judge advocate to inform the accused that *it* admitted all he proposed to prove by a certain witness, this action was disapproved as beyond the province of the court; the judge advocate, not the court, being the prosecutor. G. C. M. O. 59, Dept. of the Platte, 1872. So, as illustrating the general subject, may be noticed here the remark of the reviewing authority in G. C. M. O. 55, Dept. of the Mo., 1873, that "the *court* had no authority to instruct the judge advocate whether a certain case should be prosecuted or not, the prosecution being a duty devolving solely upon the judge advocate, for which he is answerable to the convening commander."

[4] He may make an argument whether the accused does or not. G. C. M. O. 11 of 1872. Or he may decline argument; as did the judge advocate, (Judge Advocate General Holt,) on Gen. F. J. Porter's trial, for the expressed reason that the exigencies of the existing war did not justify his taking up the requisite time. Printed Trial, p. 218.

Direction as to the course and conduct of the prosecution. As prosecutor, the judge advocate, representing as he does the State, and acting under an authority identical with or equal to that of the court, should, as a general rule, be regarded as independent of the court,[1] and therefore as empowered, in the absence of special instructions on the subject from the convening officer, to conduct the prosecution in such mode or upon such plan as may appear to himself most advantageous. Even in the British practice, as it is observed by Simmons,[2] he "is usually permitted to adduce his evidence in the order he may think fit." And in our service, where he is made prosecutor by express statute, he should in general be deemed entitled to the same privilege which is uniformly accorded to prosecuting attorneys in the criminal courts, of presenting such evidence in support of the charge as he may judge to be requisite or desirable and of presenting it in the form which he may consider most effective, of reserving such testimony for the rebuttal as he may regard not so pertinent to the direct examination, and of preserving throughout the logical sequence determined upon by him, in preparing the case, as according with the progressive stages of the history of the offence.[3]

But while thus entitled in general to be left free as to the form of the presentation of his proofs, it is of course incumbent upon the judge advocate, as prosecutor, "to lay before the court the full particulars"[4] of the offences charged. And the only safe rule for him is to put in *all* the material testimony that is available, and not merely cumulative.[1] The court is sworn to "try and determine" the matter before it, and it cannot do so unless placed in possession of all the facts. Thus the court may properly intimate to an inexperienced or careless judge advocate that he has omitted to prove a material allegation in a specification, or to evoke a material circumstance from a witness before the court, or to introduce a material witness whom it desires to have called. On the other hand, it may check an over-zealous judge advocate who is proving too much by needlessly putting in cumulative testimony or otherwise unreasonably protracting the investigation.

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[1] See Kennedy, 222; Hughes, 111.

[2] § 571.

[3] In the leading naval case of Capt. Barron, (Printed Trial, 131-2,) the court made a general ruling as follows:—"The order in which the testimony on the part of the prosecution, either verbal or written, shall be exhibited before the court is a subject resting altogether in the discretion * * * of the judge advocate. The court will exercise no control over it, but will hear everything which they ought to hear, and in any order in which it may be thought proper to exhibit it." And see later cases to a similar effect in G. C. M. O. 97, Dept. of Dakota, 1878; Do. 38, Dept. of Texas, 1878; and compare, as to the civil practice, 1 Burr's Trial, 85, 469; Davany *v.* Coon, 45 Miss. 71.

[4] Hughes, 118. And see G. C. M. O. 6, Dept. of Arizona, 1888; also G. O. 23 of 1824, where the President censures a judge advocate for not producing the proper witnesses, who were apparently readily available, to prove the charge.

Authority as to entry of nolle prosequi. It is clear that this authority, that is to say the authority to withdraw a particular charge or specification from the consideration of the court, cannot belong to the judge advocate as prosecutor, his duty as such being simply to prosecute the charges committed to him, without addition or subtraction. Of his own motion, and in the absence of authority from the commander, (for the *court* cannot supply it,[2]) he can no more withdraw a charge after arraignment than he can drop one before:[3] should he venture unauthorized to do so—for whatever reason, whether because of a defect in the charge itself, or of a deficiency of evidence to support it, or otherwise—he would be guilty of a military offence. If he is of opinion that a charge or specification should be *nol prossed*, and no authority for the purpose has been imparted in advance, he should apply for the same to headquarters, the court, (if concurring,) meanwhile adjourning over if necessary.[1]

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[1] See G. C. M. O. 36, Dept. of Texas, 1893.

[2] G. C. M. O. 84 of 1887; Do. 23, Dept. of Dakota, 1886; Do. 6, Dept. of Arizona, 1886; Do. 68, Id., 1887. Especially is the court not empowered to authorize a *nolle prosequi* where the accused has been arraigned upon and has pleaded to the charges, since then, (in the absence of a legal withdrawal—see Chapter X,) he is entitled to a verdict, and the proper course for the court is to acquit upon the charge or specification in question. G. C. M. O. 29, Dept. of the Mo., 1886.

The nature of the procedure of Nolle Prosequi is considered in Chapter XV.

[3] "After charges have been properly referred to a court for trial, none save the convening authority, or the Secretary of War, can order a *nolle prosequi* to be entered." G. O, 98, Dept. of the Cumberland, 1868, (Gen. Thomas.) And see Do. 97, Dept. of No. Ca., 1865; Do. 85, Dept. of the South, 1874; G. C. M. O. 79, Dept. of the Platte, 1877; Do. 13, Id., 1878; Do. 45, 48, Div. Pacific and Dept. of Cal., 1880; also Do. 84, (A. G. O.), 1887; Do. 73, Dept. of the Platte, 1887.

Duty as a minister of justice. It was remarked by the judge in a late case in the Central Criminal Court of London,[2] that it is "a general principle of criminal procedure that counsel for the prosecution should consider themselves not merely as advocates but as ministers of justice, and not as struggling for a verdict but as assistants in the ascertainment of truth according to law." Similarly, in a leading criminal case in Michigan,[3] the court observe:—"A public prosecutor is not a plaintiff's attorney, but a sworn minister of justice, as much bound to protect the innocent as to pursue the guilty." So, O'Brien[4] says of the judge advocate:—"He is to use no undue means to secure the conviction rather than the acquittal of the accused." In other words, while he is not "to permit the interests of the public to suffer,"[5] by failing to prosecute "with spirit and resolution,"[6] he is to remember that it is not incompatible but consonant with his capacity as prosecutor to be so far impartial as not only not to obstruct but to facilitate the accused in making such defence or offering such matter of extenuation as may exist in the case.[7]

It is in view of this principle that it has been held by certain courts, both in England and the United States,[8] that the prosecuting officer, in presenting his case, is not at liberty to select those witnesses only whose testimony will conduce to a conviction, leaving the accused to offer the rest, but that it is incumbent upon him to introduce all the witnesses present at the commission of the act charged or cognizant of the same, if attainable, before the accused is called upon for his defence. Thus it is held in one case:[1]—"All the facts constituting the *res gestæ*, so far as the prosecuting counsel is informed of and has the means of proving them, should, on principle and in fairness to the prisoner, be laid before the jury by the prosecution." And in a later case[2] it is remarked:—"The only legitimate object of the prosecution is to show the whole transaction as it was, whether its tendency is to establish guilt or innocence. The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. His object, like that of the court, should be simply justice, and he has no right to sacrifice this to any pride of professional success." In the opinion of the author, this rule, though not followed by some other authorities who "regard it as properly within the discretion of the prosecuting officer to produce such witnesses and such only as he thinks best,"[3] is believed especially to commend itself to adoption in the court-martial practice, and particularly in cases of enlisted men, and of officers undefended by competent counsel.[4]

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[1] G. C. M. O. 14, Dept. of Cal., 1883.

[2] Regina *v.* Berens, 4 F. & F., 842.

[3] Wellar *v.* People, 30 Mich. 23.

[4] Page 284.

[5] De Hart, 323.

[6] Adye, 119.

[7] See De Hart, 323. "The danger in most cases is that, as prosecutor, he is inclined to be too severe upon the accused, to accept his guilt as a foregone conclusion, and rather to aim to prove it than simply, as is his sole duty, to exhaust all the evidence *pro* and *con*, and let that determine the guilt or innocence of the accused." Coppée, 60. And see the subject of "Absence of bias," *ante*.

[8] Regina *v.* Holden, 8 C. & P., 606; Regina *v.* Stroner, 1 C. & K., 650; Maher *v.* People, 10 Mich., 225–6; Hurd *v.* People, 25 Mich., 416; Wellar *v.* People, 30 Mich., 16.

As Adviser to the Court, and in his Relation to the Same.—***His duty in general.*** As already noticed, one of the three principal functions assigned to the judge advocate of a court-martial is that of "adviser to the court in matters of form and law."[5] In this capacity a twofold duty is devolved upon this officer:

1. He is bound to *furnish his opinion* on any question of law, practice, or procedure, arising in the course of the trial, when the same is required of him by the court.[6] It is the right of the

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[1] Maher *v.* People, *ante.*

[2] Hurd *v.* People, *ante.*

[3] See 1 Bishop, C. P. § 966 *c.*

[4] See remarks of Lord Brougham in Parliament, as cited by Clode, 2 M. F., 363–4.
There is here to be noted, as a further branch of his function as prosecutor, the duty devolving upon the Judge Advocate, under par. 1018, A. R., to furnish the court in proper cases with evidence of *previous convictions* of the accused, if any.

[5] Kennedy, 222.

[6] See Tytler, 352–355; Simmons § 466; Kennedy, 224–5; Stocqueler, 113; Hughes, 120; Hickman, 137; XIV. Law Mag., 13; Maltby, 121–2; O'Brien, 283, De Hart, 325; Benét, 201; Coppée, 57.

court to call upon him for such advice and assistance, but if the preparation of the opinion demands unusual labor, the court will properly adjourn to give him time to consult the authorities, &c. In general the opinion of a competent judge advocate, thus furnished, will be accepted as decisive by the court.[1] But even if wholly dissented from and in no respect followed, the judge advocate is entitled, for his own justification, and not by way of protest but as a part of the proceedings, to have such opinion incorporated in the written record: it should also be so recorded for the information of the reviewing authority.[2]

2. While it will be irregular for the judge advocate, except when his opinion is thus asked, to interpose his views in regard to any question which it is within the province and discretion of the court to determine, yet if the action proposed by it to be taken upon such a question will clearly transcend some statute, regulation, order or usage, or an established principle of law, it will then be his *duty to point out the fact*. In other words, where the error of the court is simply one of judgment, the judge advocate, though, in his opinion, such error may work injustice in the case, should remain silent: otherwise where the action, if taken, will manifestly contravene an article of war or other law of the service, or legal principle properly governing the procedure of courts-martial,—here he is authorized, and it is indeed his duty, respectfully to *caution* the court against the apprehended illegality.[3]

His attitude when the Court is closed. Up to a recent date the judge advocate invariably remained, as an *assessor*, with the court when closed for deliberation, advising it if required to do so, and calling attention to formal errors if any, but carefully refraining from any expression of opinion that might influence the votes of the members.[1] But however scrupulous he might be in this regard, the accused had certainly good ground for complaining that *he* was excluded while the judge advocate was admitted at so important a stage of the proceedings,[2] and the apparent unfairness of the practice not unfrequently evoked serious criticism.[3] But now, by the Act of July 27, 1892, c. 273, s. 2, it has been specifically prescribed on this subject as follows:—"*Whenever a court-martial shall sit in closed session, the judge advocate shall withdraw, and when his legal advice, or his assistance in referring to recorded evidence, is required, it shall be obtained in open court.*" Under this statute the judge advocate now retires from the court room, (with the accused, &c.,) whenever the court clears for deliberation, either on the finding and sentence,[4] or upon any interlocutory matter such as a challenge, an objection to evidence, &c. And hereafter when a question arises, in closed session, as to which the opinion of the judge advocate is desired, the court must be re-opened, and such opinion sought and rendered in the presence of the accused, subject to such exception or right of reply as he would be entitled to at any other open stage. In practice the occasions of such requiring of opinion have as yet been rare.

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[1] See Simmons § 470; Kennedy, 228; Hughes, 127. Note the special consequence attached to the advice and opinion of the judge advocate in the British law by the Rules of Procedure, § 101 (F,) explained in the same Rule by the declaration that—"at a court-martial, he represents the judge advocate general."

[2] Tytler, 354–5; Hough, (A.) 71–2; Kennedy, 226–7; XIV Law Mag., 14; Hughes, 123–128; Maltby, 122; O'Brien, 283; De Hart, 324–6. *Contra*, Simmons § 496 and note. In G. O. 5 of 1857, the Secretary of War remarks:—"The court refused to admit on their record an argument of the judge advocate, objecting to an application by the defence for delay. It was the duty of the judge advocate to make the objection, and the argument by which he sustained it was very proper. It was a part of the proceedings which ought to have been entered on the record." And see G. O. 17, Dept. of Florida, 1866; Do. 50, Dept. of La., 1869.

[3] See Benét, 201; O'Brien, 283; De Hart, 325.

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[1] See generally, upon this subject, Simmons § 612, 636; Kennedy, 229, 230; Stocqueler, 113; Hickman, 137; Bombay, R., 31; Macomb, 58; De Hart, 327–8; O'Brien, 283, 284; Benét, 201–2; Coppée, 60.

[2] The leading case in which the prevailing practice was asserted was that of Capt. Amos Binney, reported in "The Militia Reporter," p. 180, (1810.) Here, upon the court clearing to consider an objection to evidence, the accused claimed that he had a right to remain and be heard equally with the judge advocate. The court ruled that he must retire in accordance with the established practice, and because, if they allowed him to remain, they might violate their oaths in regard to the disclosure of the votes and opinions of members. They also ruled that they could not exclude the judge advocate, for the reason that it was the custom that such officer should be present at deliberations, and that the Article which required him to be sworn not to divulge any vote or opinion, &c., evidently contemplated that he should be present.

[3] See Warren, 229, 232, 233, 254; also Report of Judiciary Committee of Senate, No. 1337, of Feb. 18, 1885.

[4] In a case which has occurred since the Act took effect, where the judge advocate was allowed to remain with the court during the making up of its judgment, it was deemed best to disapprove the sentence as fatally irregular. G. C. M. O. 73, Dept. of Dakota, 1892. In the opinion of the author, the sentence is not invalidated in such a case.

As to preserving the votes of the members. The point was at one time considerably discussed, whether the judge advocate should preserve the written votes of the members given upon the findings or sentence. The only reason for preserving them would seem to be that, in their absence, the judge advocate, (or a member,) would not be enabled or would be less able to testify as to the same if called upon to do so by a "court of justice"—the contingency indicated in Arts. 84 and 85.[1] But these Articles do not *require* that he should hold himself prepared to give such evidence. Moreover the written votes are no part of the official record or papers, but mere personal memoranda. Further, if they are preserved, they may endanger the discovery, by unauthorized persons, of the votes or opinions which the judge advocate and members also have sworn not to make public.[2] The question involved is really one which concerns less the judge advocate than the members, since the latter may, under certain circumstances, become amenable to a civil suit for damages for their action upon the court. And now that the judge advocate is excluded from deliberations in closed session, it is especially appropriate for the members to decide this question for themselves. To destroy such papers is believed to be the almost uniform practice in our service.[3]

The personal relations of court and judge advocate. In this connection the personal relation proper and desirable to be maintained between the judge advocate and the court may well be touched upon. It is clear, as indicated by De Hart,[4] that such acts on the part of the judge advocate as the expressing of opinions where the same are not requested or warranted, the raising of points as to unimportant matters, the interposing of petty objections to testimony, and the exhibition of testiness or irritability, can only bore and worry an assemblage of military men, and incline them to override the judge advocate in the positions taken by him.

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[1] 1 McArthur, 323; Tytler, (edit. of 1800,) 371.

[2] See Simmons § 614; Kennedy, 237; Tytler, xiii (Opinion of J. A. Gen., Sir Chas. Morgan;) Stocqueler, 114; Griffiths, 176; Benét, 127.

[3] See this subject also considered in Chapter XIX on the Finding.

[4] Page 328. And see Coppée, 60.

On the other hand, within his separate province, the judge advocate is entitled to be recognized by the court as occupying a position as independent as its own, and, wherever a proper and adequate occasion presents itself, is authorized not only fully to express but to accentuate his views, even at the risk of offending some member or members who may entertain opposite opinions. But where the judge advocate is a person uniting tact with skill, he will rarely find it necessary to assert himself as against the court. The latter perceiving him to be master of his case, and not dogmatic but simple and dignified in his manner of presenting it, will come to respect his opinions, and to consult and follow him as a legal adviser. Thus a mutual deference and confidence will arise, which will not only do away with much of the irritation incident to the collisions of an extended trial, but will result in a harmonious and effective dispatch of business.

Amenability of judge advocate for misconduct before the court. It need hardly be added that while the judge advocate cannot of course be placed in arrest by the court or its president,[1] he may be made amenable, under the 62d or other appropriate article, for any marked disrespect or disorderly behaviour in its presence, upon a representation made by it of the facts, or formal charges preferred, to the proper superior. So, for disturbing the proceedings as indicated in Art. 86, he may become punishable as for a contempt. The author, however, is not aware of any precedent in our service of a conviction by court-martial of an officer for misconduct of this character in the capacity of a judge advocate.[2]

As Counsel or Adviser of, and in his Relation to, the Accused.—***Particulars already considered.*** Under the head of the province of the judge advocate prior to the trial, we have noted the duties, devolving upon him at that stage, of serving (and explaining where necessary) the charges, furnishing a copy of the convening order, giving notice of time and place of trial, summoning witnesses for the defence, &c. We have now to inquire how far the judge advocate is called upon to counsel or assist the accused pending the trial or in connection therewith, and, generally, as to his official relation to the accused.

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[1] Chapter XII. And see McNaghten, 170–1; DIGEST, 461.

[2] But see British precedents referred to by Hough, (P.) 704; also case of Major Browne reported in James, 504.

Effect of Art. 90. This Article declares that the judge advocate, "*when the prisoner has made his plea, shall so far consider himself counsel for the prisoner as to object to any leading question to any of the witnesses, and to any question to the prisoner the answer to which might tend to criminate himself.*" This is a most imperfect and ineffective provision; objecting to leading questions is but a single feature of the function of counsel, and, as to questions "to the prisoner," these are now unknown in our practice.[1] This provision, (derived from the Articles of 1786,) illustrates the fact that the entire Article is in the main obsolete and futile, and might well, as already indicated, be omitted from the code.[2]

Nature and extent of his function as counsel, &c. It is clear that the judge advocate cannot act in a *personal* capacity of counsel to the accused, since such a character would be incompatible with that of public prosecutor. Thus it is clearly only in an *official* relation that he can advise or assist the accused. We have already seen that a judge advocate is bound to consider himself not merely as a prosecutor but as a "minister of justice;" the common law doctrine being that the prosecuting official in a criminal proceeding was "the assistant of the court in the furtherance of justice."[3] This doctrine is applied to the military procedure by Simmons,[1] in holding that it is "in consonance with the custom of the service that the judge advocate should only interfere to the extent to which the court itself is bound to interpose." In our practice, however, no strict rule has been prescribed or observed on this subject; and how far the judge advocate shall properly counsel and assist the accused is left to depend in the first instance on whether he is furnished with competent personal counsel, and secondly on his own intelligence and ability to defend himself. Where he is without counsel, and especially where he is an ignorant or inexperienced soldier, the judge advocate will properly render him, both in and out of court,[2] such assistance as may be compatible with his primary duty of efficiently conducting the prosecution.[3] In addition to aiding him before the trial in collecting his proofs and preparing his defence if he has one,—(and he will especially guard against even suggesting his pleading *guilty* if the case has any merits whatever,[1])—he will properly assist him in presenting in due form such challenges as he may desire to urge,[2] in offering his plea or pleas general or special, and in bringing out the full testimony of the defence on the trial,[3] as well as such circumstances of extenuation as may exist in the case;[4] and will further advise him of his right to be furnished with counsel, to take the stand as a witness, and, generally, as to his rights and privileges at all stages of the case.[5]

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[1] Except indeed in a case—of course not contemplated by this Article—where, under the recent Act of March 16, 1878, the accused goes on the stand as a *witness* in his own behalf, when he is examined and treated like any other witness. This Article has in view an *inquisitorial* examination.

[2] The declaration that—"The judge advocate shall prosecute in the name of the United States," is the only provision that is of any significance. This part of the Article might well be incorporated with Art. 74, the remaining portion being dropped from the code.

[3] Regina *v.* Thursfield, 8 C. & P. 269. And see Regina *v.* Berens, 4 F. & F. 842. The origin of this doctrine is the maxim or rather fiction of the common law that on an indictment for treason or felony, as the prisoner was not entitled to defend by counsel, the judge acted as his counsel. 4 Black. Com., 355; 1 Bishop, C. P. § 296; 2 McArthur, 41.

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[1] § 468. "In his duty toward the prisoner, indeed, he is not obliged to go farther than the court itself: the court sits for the purpose of doing justice, and is bound to take care that the prisoner does not suffer from his ignorance, inexperience, or incapacity." Pipon & Col., 40. And see XIV Law Mag., 13; Macomb, 81; Benét, 196. Lord Brougham, in a debate in Parliament, described the judge advocate as: "the assessor of the court—standing between the prisoner and the court." Clode, M. L., 126.

[2] The distinction taken by Kennedy, (p. 235,) and repeated by some of our writers, (O'Brien, 285; De Hart, 309; Benét, 196,) that a judge advocate may more properly or fully assist an accused *out* of than *in* court, has no place in our law and is not regarded in practice. At what stage or stages the judge advocate will best or most properly advise or assist the accused will depend upon the circumstances of each case.

The doctrine as stated by Simmons, (§ 468, and see Pipon & Col., 40,) may be noted here—that the accused has a "*right* to the *opinion* of the judge advocate, either in or out of court, on any given question of law arising out of the proceedings." This rule, (repeated by De Hart, p. 312,) is now declared in the Rules of Procedure, 101 (A.,) as follows:—"The prosecutor and the prisoner respectively are, at all times after the judge advocate is named to act on the court, entitled to his opinion on any question of law relative to the charge or trial, whether he is in or out of court, subject when he is in court to the permission of the court." But this doctrine too has no place in our law, where the judge advocate differs from the same official in the British procedure in being the prosecutor and in not representing the Judge Advocate General. With us he furnishes no opinions except when requested to do so by the court. The court indeed may ask his opinion at the instance of the accused. But official opinions *out of court* are unknown in our practice.

[3] See Tytler, 355; Stocqueler, 113; Macomb, 80; Coppée, 20; G. O. 45, Third Mil. Dist., 1868; Queen's Regulations, Sec. VI § 84. The judge advocate should not, "in his zeal as prosecutor," be induced to "overlook the interests of the prisoner." G. C. M. O. 3, Dept. of Arizona, 1883. (Gen. Crook.)

It is in omitting to bring out in evidence existing matters of defence or extenuation, that judge advocates are most liable to fail in furthering complete justice in military cases. Though the defences and excuses set up by enlisted men in their statements to the court, especially in connection with pleas of guilty, are not unfrequently fabrications, they are by no means always so; and where there is no sufficient reason to doubt the good faith of the accused, the representations made in his statement, if not already sufficiently tested by evidence on the trial, may and in justice should be investigated, so far as the circumstances and exigencies of the service will reasonably permit. That it is incumbent on the judge advocate, (as well as on the court,) where the statement of the accused is inconsistent with his plea of guilty, and, in asserting facts constituting a substantial defence, indicates that the plea has been ignorantly made, to assist him to establish such facts in evidence before the case is finally closed,—has been repeatedly urged by the Judge Advocate General,[6] and by reviewing officers in General Orders.[7]

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[1] "For the judge advocate to counsel the accused, when a soldier or inferior in rank, to plead guilty, must in general be unbefitting and inadvisable." DIGEST, 458. And see G. O. 45, Third Mil. Dist., 1868.

[2] See G. C. M. O. 19, Dept. of the Columbia, 1882.

[3] In G. O. 42, Dept. of the Platte, 1871, it was remarked that the judge advocate, where the accused was without counsel, might properly take exception in behalf of the latter to a legally objectionable question put to a witness by a member of the court.

[4] DIGEST, 458–9; G. O. 45, Third Mil. Dist., 1868.

[5] G. O. 75 of 1887.

[6] DIGEST, 588–590. A view similar to that expressed in the text is contained in the Bombay R., p. 53.

[7] See the following G. O. or G. C. M. O., in which the views on

The relation of the judge advocate to the accused makes it further proper that, where the latter is unskilled or ignorant, the former should assist him in the preparation of his concluding statement or address, reading it also for him to the court if desired.[1]

It is to be added, however, in this connection, that where the accused is provided with capable counsel, or, being an officer or person of unusual intelligence, is fully competent to conduct his own defence, the relation of the judge advocate toward him is so far modified that the former may be required, in the interests of justice, to assume a controversial if not an aggressive attitude. It will then indeed be his duty to resist the introduction by the accused of objectionable testimony, to contest any inadmissible special pleas or unreasonable motions made by him, and generally, while courteous in his treatment of him and strictly fair and considerate of his rights, to maintain with the zeal and energy of a champion the cause of the United States.

As Recorder.—***In general.*** The duty of the judge advocate as recorder or registrar of the proceedings is not, in our law, as is that of prosecutor, attached to his office by statute, but by long established custom. This, while one of the principal functions of the judge advocate, is one in the exercise of which he is less independent than in any other, being here subject in the main to the direction and control of the court. That it is the court which really makes the record, the judge advocate being little more than its agent in the matter, is recognized in the

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this subject of the Judge Advocate General are concurred in, or similar views are advanced, by military commanders: G. C. M. O. 2 of 1872; Do. 31 of 1876; Do. 34, Northern Dept., 1865; Do. 46, Dept. of the South, 1868; Do. 7, Id., 1869; Do. 28, Dept. of the Platte, 1869; Do. 39, Id., 1870; Do. 24, 68, Id., 1871; G. O. 31, Dept. of Cal., 1872; Do. 55, Id., 1874; Do. 98, Dept. of the East, 1872; Do. 14, 43, 68, Id., 1873; Do. 81, 83, 98, Dept. of Dakota, 1873; Do. 8, Id., 1876; Do. 19, 33, 38, Dept. of Texas, 1873; Do. 11, 16, 18, Id., 1874; Do. 45, Id., 1875; Do. 5, 74, Dept. of the Mo., 1875; Do. 61, Id., 1876; Do. 29, Div. Atlantic, 1874; Do. 23, Id., 1875; Circ., Dept. of the Gulf, Oct. 12, 1863.

[1] See Benét, 117. That a judge advocate cannot, independently of the court, assume, on account of its objectionable character, to reject a "statement" proposed to be offered by the accused, and require him to substitute another, was properly held in G. O. 31, Div. Atlantic, 1873.

Army Regulations, which, in par. 914, provide that—"every court-martial shall keep a complete and accurate record of its proceedings." But while the court is primarily responsible as well for the form as for the substance of the record, the judge advocate is chargeable with any lack of due carefulness which he may display in making it up, as well as for any omissions, inaccuracies, or other errors, which are traceable to his own negligence.[1]

The Record thus being a history not properly of a prosecution by the judge advocate but of an investigation and judgment by the court, will be more suitably considered hereafter in a separate Chapter.

Authority and Duty under Art. 85—***Disclosure of "vote or opinion."*** This Article provides that there shall be administered by the president of the court to the judge advocate, before the trial is entered upon, an oath that he "*will not disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, in due course of law; nor divulge the sentence of the court to any but the proper authority, until it shall be duly disclosed by the same.*" This provision amounts, in the first place, to a prohibition of the disclosure, either directly or indirectly, by the judge advocate, in making up the record or otherwise, of the vote or opinion of any member, not only upon the finding but also upon any *interlocutory question* determined by the court. And a disclosure of the combined vote of *all* the members is a breach of the oath: thus a statement in the record that a vote or finding was "unanimous" has properly been held to constitute a violation of the prohibition of this Article, (as well as of the 84th,) since it is a disclosure of the opinion of each individual member.[2]

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[1] In G. C. M. O. 29, Dept. of Texas, 1884, the following comment is made by Gen. Stanley upon the performance of his duty as a recorder by a judge advocate—"The judge advocate's want of appreciation of his duties is amply illustrated in the record of this case. A more incoherent, inaccurate, incomplete and utterly unreliable record of proceedings than the one now under review has seldom reached a reviewing officer." *Contra*, note the commendation, by Gen. Wheaton, in G. C. M. O. 9, Dept. of Texas, 1893, of the extra care shown by a judge advocate in so preserving his original minutes of the proceedings of a trial, that the formal record lost in the mail was enabled to to be duplicated.

[2] See DIGEST, 98.

In regard to a corresponding article in the then British code, the view was expressed by Hough[1] that the judge advocate, though forbidden to disclose votes and opinions of members, was "not precluded by the Article to state any circumstances within his knowledge which may not be recorded on the proceedings, which the commander-in-chief should be confidentially informed of," so long, he adds, as the same did not extend to the discovery of the views of any particular member but concerned only its "general opinion." And Macomb,[2] upon this subject, writes:—"It is not inconsistent with his oath or duty for the judge advocate to communicate to the proper authority his views of the proceedings of the court." The occasions, however, will certainly be rare when the judge advocate will be justified in making a communication of such a character. And now, since the enactment of the statutory provision of July 27, 1892, by which the judge advocate is excluded from closed sessions, it will be most rarely that he will ever *know* the vote or opinion of a member, or be able to disclose such, either before a court of justice or otherwise.

Divulging of the sentence. Although the judge advocate is not present at the making up of its judgment by the court, the sentence, if any, with the findings, must be communicated to him in order that the same may be entered in the record, and that such communication shall be made is contemplated by the terms of the 84th Article, as amended by the legislation of July 27, 1892. As to the divulging by him of the sentence when thus imparted to him—there is nothing in the form of his oath, as prescribed by Art. 85,[3] to preclude the judge advocate from making known the sentence to the reviewing officer *prior* to the forwarding to him of the completed record. In practice, however, this is not often done, the custom of forwarding the proceedings immediately upon the termination of the trial doing away in general with any occasion for communicating the sentence before it would regularly become known from the record itself.

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[1] Page 373, note.

[2] Page 34. And see O'Brien, 259.

[3] This part of the oath in the British law is:—"You do swear that you will not, *unless it is necessary for the due discharge of your official duties*, divulge the sentence of this court-martial until it is duly confirmed." Rules of Procedure § 27. (A.)

Unless the word "sentence" in the Article is construed as meaning *judgment*,—and no sufficient authority is perceived for such a construction,—it would not, strictly, constitute a violation of the oath for the judge advocate to disclose the fact of an *acquittal* by the court. But such a disclosure, made to the accused or any person other than the reviewing authority, would be so clearly contrary to the *spirit* of the Article and to the usage of the service, and so manifestly a breach of official confidence on the part of the judge advocate, as properly to render him amenable to a charge under Art. 62.[1]

Being prohibited from divulging the sentence "to any but the proper authority," the judge advocate can not of course communicate it to a clerk or reporter employed to write out the proceedings, but must himself enter it in the record in his own writing.[2]

Authority and Duty under Sec. 1202, Rev. Sts.—*Effect of the provision.* This statute, by which provision is made for the issuing of process of attachment of witnesses by judge advocates, is as follows:—"*Every judge advocate of a court-martial*[3] *shall have power to issue the like process to compel witnesses to appear and testify which courts of criminal jurisdiction within the State, Territory, or District where such military courts shall be ordered to sit, may lawfully issue.*"

This statute, which would properly be included in the code as an article of war, was originally a provision of an Act of 1863, the first legislation on the subject.[4] In transferring this provision to the Rev. Sts. the words "or court of inquiry" which followed the words "court-martial" were omitted. The authority conferred, therefore, while it may legally be exercised by judge advocates of inferior as well as of general courts, cannot be exercised by recorders of courts of inquiry.

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[1] In a recent Order—G. C. M. O. 11, Dept. of the Mo., 1882—Gen. Pope, in passing upon a case of a soldier acquitted by a general court-martial, remarks as follows:—" After the close of this case the court directed the judge advocate to communicate to the *post commander* the fact of the acquittal of the accused. To this the judge advocate took exception on the ground that he felt bound by the nature of his oath not to so divulge the finding of the court, and had therefore respectfully to refuse to obey its mandate. These facts appearing of record, the Department Commander rules that the court exceeded its authority in the premises."

[2] Neither findings nor sentence can properly be printed in the record with a type-writer. Circ. No. 12, (H. A.,) 1883; G. C. M. O. 11, Dept. of the Columbia, 1892.

[3] That this means court-martial in the *army*, and that the judge advocate of a *naval* court-martial is invested with no such power, has been ruled by the Attorney General. 19 Opins., 501.

[4] See 3 Jour. Cong., 392, (November, 1779,) where it is recommended

The authority is in terms vested solely in the judge advocate, and it is by him alone that the process can be initiated. No power is conferred upon the *court*, nor does the mandate, like the writ of a civil tribunal, issue in its name.[1] The judge advocate, however, will sometimes properly *consult* the court as to the desirableness of resorting to an attachment; especially where any considerable time may be required for the service and return of the same, and an unusual adjournment may thus be necessitated. He will also properly resort to it whenever the court, in its desire to secure the best or material evidence not otherwise procurable, calls upon him for the purpose.[2]

Nature of the authority. To authorize a resort to an attachment under this statute, there must have been a formal subpœna duly issued by the judge advocate and duly served upon the witness, and not complied with by him.[3] The authority to issue the compulsory process is co-extensive with the authority to issue the subpœna, and with the jurisdiction of the court. The judge advocate of a court-martial convened at any place within the United States may issue an attachment to compel the attendance before it of a witness resident or being at any other place therein,[4] and whether he be a military person or civilian.[5] It was, however, for securing the attendance of *civilian* witnesses that the enactment was originally designed.

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by Congress to the State authorities to grant writs, on the application of judge advocates, to compel the attendance of witnesses before courts-martial.

[1] "The attachment is not a writ or process of the *court*, but simply a compulsory instrumentality placed at the disposition of the judge advocate as the prosecuting official representing the United States." DIGEST, 757.

[2] See G. C. M. O. 32, Dept. of the Columbia, 1882.

[3] DIGEST, 757; G. O. 93 of 1868; 1 Greenl. Ev. § 315, 319. As to the proper mode of service, see *ante*. Par. 1009, A. R., indicates that it "may be served by any person whatsoever."

[4] See DIGEST, 757–8, and note.

[5] 12 Opins. At. Gen., 501; 19 Id., 502.

Service of the process. As to the mode of executing the process, it was held by the Attorney General[1] that, in view of the omission in the Act to indicate to whom the process should be directed or by whom it should be served, the judge advocate might legally direct it to some military officer, who would thereupon be "charged with the duty of executing it." Upon this ruling was issued G. O. 93 of 1868, now incorporated in par. 1009 of the Army Regulations, by which it is enjoined that the judge advocate issuing the process, "will formally direct the same to an officer designated by the Department Commander for that service;"[2] and it is added that "the nearest military commander will thereupon furnish the necessary military force for the execution of the process, if force be required."[3] Where the attachment is to be served at a locality not within the Department, &c., it may be forwarded directed in blank, the name of a proper officer being left to be inserted by the commander at the place of service or other superior authority. The occasions, however, upon which resort has been had to the authority given by the statute have not been very numerous:[4] this because of the defects in the law next noted.

Defects of the law. In addition to not indicating in what manner the attachment is to be served and executed, the Section under consideration may be deemed to be defective in not providing for compelling the witness to *testify*. In the absence of any such provision, and in view of the fact that Art. 86 does not authorize punishing as for a *contempt* a witness refusing to testify,[5] it follows that a civilian witness, though duly attached and compelled to appear, may, with entire impunity, refuse, if he see fit, to give any testimony whatever; no power to compel him, or to attempt to compel him, to depose being vested either in the judge advocate[1] or the court. This is a serious defect in the military law, calling for an amendment either of Art. 86 or of Sec. 1202.

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[1] 12 Opins., At. Gen., 501.

[2] In view of the regulation, it would not be proper for the judge advocate to direct the process to a U. S. Marshal or other civil official. See DIGEST, 753, 758.

[3] See DIGEST, 758–9.

[4] The most ample use known to have been made of this process in any instance was on the trial of McRae and others, by military commission, in North Carolina, in 1867, when it was resorted to to compel the attendance of *five* persons as witnesses.

Forms of the Attachment are given in the Appendix.

[5] See Chapter XVII.—"Art. 86: Its general effect," and *note* referring to rulings on this subject.

Authority and Duty under Section 1203, Rev. Sts.— ***Exercise of the authority.*** This section, which might also well have been inserted in the code as an article of war, and of which the original is a provision of the Act of March 3, 1863, c. 75, is expressed as follows:—"*The judge advocate of a military court shall have power to appoint a reporter, who shall record the proceedings of, and testimony taken before, such court, and may set down the same, in the first instance, in short-hand. The reporter shall, before entering upon his duty, be sworn, or affirmed, faithfully to perform the same.*"

The power to appoint the reporter is perceived to be vested exclusively in the judge advocate; it thus cannot be exercised by the court, nor is it essential that the court should concur in an appointment.[2] Inasmuch, however, as the court is responsible for the record which the reporter is to write, the judge advocate will be careful to employ as reporter such a person only as will be acceptable and satisfactory to the court, and will properly discontinue the employment where the appointee does not prove thus satisfactory.

The expense of a short-hand reporter should of course be incurred only in an important case, and a General Order of 1880, incorporated in par. 1046 of the Army Regulations, declares that the employment of such a reporter shall be authorized only "in cases where the authority appointing the court may consider it necessary." As imposing a restriction upon a power conferred by statute, the legality of such an order may be doubted; in itself, however, it is a proper and desirable regulation, and should of course, (till rescinded or modified,) be strictly observed by the judge advocate, especially as its observance may be a necessary condition to the receiving by the reporter of his compensation.

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[1] The provision of Sec. 1202, that the judge advocate "shall have power to issue process to compel a witness to appear *and testify*," can clearly not be construed as vesting a judge advocate with power to employ *force* against, or to *punish*, a witness. The words "and testify" have reference only to the effect and purpose of the process of attachment.

[2] DIGEST, 659.

Status, compensation, &c., of reporter. The judge advocate will properly supervise the performance of his duty by the reporter, giving him the needful instructions. By whom the reporter shall be sworn is not indicated in the law: in practice he has been sworn by the judge advocate, who is now certainly thereto authorized by the legislation of July 27, 1892.[1] Although it is prescribed in general terms in the Section that the reporter "shall record the proceedings and testimony," it is clear, in view of the provisions of Arts. 84 and 85, that he cannot, any more than an ordinary clerk, properly be permitted to remain with the court after it is cleared for its final deliberation, for the purpose of recording the findings and sentence.[2]

The statute, in authorizing the appointment of short-hand reporters, contemplates of course that they shall be properly compensated, and par. 1047 of the Army Regulations, now fixes their compensation at an amount "not to exceed ten dollars a day," and "in special cases" a certain rate "per folio for taking and transcribing notes," &c. It is added—"Reporters will be paid by the Pay Department, on the certificate of the judge advocate." The annual Appropriation Act for the Army contains an express appropriation—"for compensation of reporters (and witnesses) attending upon courts-martial and courts of inquiry."

DUTY OF THE JUDGE ADVOCATE AFTER THE TRIAL AND COMPLETION OF THE PROCEEDINGS.

It is a part of the duty of the judge advocate to give certificates of attendance to the civilian witnesses, including such as may have attended to testify by deposition, in order that they may receive their legal allowances for attendance and travel. Such certificates may indeed be given pending the trial, when the witnesses are not required to be detained till its completion. The law does not authorize the payment of witness fees *in advance* in military cases. The allowances and compensation of witnesses before courts-martial are set forth in Art. LXXVI of the Army Regulations.[1]

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[1] In Circ. No. 12, (H. A.,) 1892, the form of the oath is prescribed as follows—"You swear that you will faithfully perform the duties of reporter to this court. So help you God."

[2] DIGEST, 264, 660. But the fact that he was allowed to remain would not affect the *legal validity* of the finding or sentence. Id., 98, 264.

Besides making out the proper certificates for witnesses and reporters, the only duties devolving upon the judge advocate after the proceedings of the court have been finally terminated and authenticated, are to complete the formal record, (annexing the exhibits, &c.,) and forward the same to the proper reviewing authority. The perfecting of the record will be referred to in the Chapter on the Record.

The Forwarding of the Record. This duty is enjoined upon the judge advocate by the 113th Article of war, but this Article is defective in requiring judge advocates of general courts to forward the proceedings in all cases direct to the Judge Advocate General. In this general requirement the Article is not in harmony with the provisions of Arts. 104 and 109, requiring the approval of the proceedings, &c., by the officer ordering the court; and the existing practice does not accord with it except in cases of records of courts which have been ordered by the President. The practice, and proper procedure, in the first instance, are therefore now indicated in the Army Regulations, par. 1041, as follows:—"The judge advocate shall transmit the proceedings (of general courts-martial) without delay to the officer having authority to confirm the sentence." Proceedings of courts ordered by the President are required, by par. 985, to be "sent direct to the Secretary of War;" and proceedings of courts "which require the confirmation of the President, but have not been appointed by him," and those which, under par. 1023, specially require the action of the Secretary of War, "will be forwarded direct to the Judge Advocate General."

A judge advocate is amenable to trial for neglect of duty in unreasonably delaying to forward a record. The General Orders of the Department of Virginia[2] contain a case of an officer convicted of the offence of neglecting, for thirteen days after their completion, to forward certain records of a military commission of which he was judge advocate, "thereby," as it is added in the specification, "unnecessarily prolonging the imprisonment of" an accused "who had been acquitted by the said commission." In a further case in the Department of the Lakes,[1] in which the proceedings were not transmitted by the judge advocate to department headquarters till at the end of a month after the completion of the trial, the reviewing authority, Gen. Robinson, remarks:—"No amount of extra duty required of any officer can excuse him for such delay as this while acting as judge advocate." And he adds that the judge advocate should promptly forward the record, not only because directed to do so by the Army Regulations, but because "common justice to the prisoner requires that he should be speedily punished if guilty or released if innocent."

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[1] And see Circ. No. 1, (H. A.,) 1886; Do. No. 10, Id., 1889.

[2] G. O. 36 of 1866.

In another Order[2] the point has been noted that a judge advocate should not defer sending forward a record till he can accompany it with records of other cases tried by the same court, but should in general transmit each record separately as soon as completed.

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[1] G. O. 10 of 1867.

[2] G. O. 10, Dept. of Texas, 1873.

CHAPTER XIV.

CHALLENGES.

In a previous Chapter we left the Court ready to proceed to be organized for the trial, subject to such objections, or challenges, as might properly be taken to the members. To this stage we now recur.

The Written Law on the Subject. The only statutory law relating to the matter of challenges is the 88th Article of war, of which the original was the 71st Article of the code of 1806. The existing Article is as follows:—"*Members of a court-martial may be challenged by a prisoner, but only for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time.*"

The Army Regulations, par. 1037, direct that the record of the court shall show that previously to the swearing of the court the accused was "asked if he wished to object to any member, and his answer to such question." The question here indicated as to be addressed to the accused is, in practice, preceded by a reading to the accused of the order or orders constituting the court and detailing the members by their names and official descriptions.

In considering the subject of the present Chapter, we will commence with a Construction of the provisions of the Article, thus disposing of several questions of importance, and examining next the Procedure under it, will conclude with a review of the Grounds of Challenge, as indicated and illustrated both by the military authorities and the rulings of the civil courts.

I. THE ARTICLE CONSTRUED AND CONSIDERED.

"Members." This general term necessarily includes the president and subjects him to challenge in precisely the same manner and to the same extent as any other member. The "members" only being made liable to objection, it follows that the judge advocate, not being a member, is not challengeable under the Article.[1] Any objection which the accused may have to the judge advocate must be addressed to the convening authority.[2]

In the term "members" are of course embraced not only the members originally detailed, (including both those present when the court is first assembled and the opportunity of challenge is first exercised by or extended to the accused, and those, if any, who may arrive and take part on a subsequent day,) but also members who may be added to the court to replace those dropped upon challenge or relieved by order.[3] For, as to all members who come, under whatever circumstances, to act upon the court, the accused has the same right, and should be offered the same opportunity, of objection under the Article. In several cases published in General Orders, the proceedings have been disapproved because it did not appear that the accused had been afforded the opportunity of challenge as to members joining, or added to, the court after its first organization or assembling.[4]

So, where a court-martial has been required to be dissolved, and a new court of some of the same members has been substituted, for the reason that by the operation of challenges or otherwise the first court was reduced below five members, the members of the second court are liable to challenge though they may have been so subject, and may even have been challenged in fact (unsuccessfully) on the original court.[5]

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[1] Simmons § 465, 499; Kennedy, 52; Hough, (A.) 48; Napier, 88; Clode, M. L., 126; Franklyn, 24; Rules of Procedure, 25, (B.;) O'Brien, 240; De Hart, 116, 312; DIGEST, 103, 457; G. O. 28, Dept. of Arizona, 1876. The point was much contested in some of the earlier cases. In the leading case, for example, of Capt. Porter, U. S. N., in 1825, the liability of the judge advocate to challenge was elaborately urged by the accused in argument, but not recognized by the court.

[2] Simmons § 465; Benét, 70; Capt. Loring's Trial, Militia Reporter, 21.

[3] Simmons § 499; Hough, (A.) 50; Kennedy, 56; McNaghten, 174; Hughes, 42.

[4] G. O. 68 of 1863; Do. 12, Dept. of the Gulf, 1865; Do. 2, Dept. of the Platte, 1868; Do. 5, Fourth Mil. Dist., 1868; G. C. M. O. 18 of 1889; Do. 6, Dept. of the Miss., 1865.

[5] See De Hart, 89-90.

"Of a Court-Martial." This term includes, with general, also regimental and garrison courts;[1] and the members of these courts are accordingly challenged in our practice, though much more rarely than the members of general courts. The term does not embrace a court of inquiry[2] nor a military commission; and no other provision exists in our code by which the challenging of members of either of these bodies is authorized: *in practice*, however, the right of challenge is recognized before each.

"May be Challenged by a Prisoner." Here is authority for the taking of exceptions to members *by the accused only*. It is uniformly held, however, by the authorities that the same right may, and in a proper case should, be exercised by the prosecution;[3] and in practice judge advocates, occasionally though not frequently, do interpose challenges on the part of the United States. Resting, as such action really does, on long-continued *usage*, it is now too late to dispute its authority. Were the question a new one, it might well be argued that the statute, in specifically extending the privilege to the "prisoner" only, was properly to be construed as excluding the prosecutor.

"Only for Cause Stated to the Court." This provision excludes *peremptory* challenges,[4] *i. e.* challenges preferred without any reasons assigned therefor. Of these a certain number were, in capital cases, allowed to the prisoner, *in favorem vitæ*, by the common law, and are now allowed to both parties in civil and criminal cases by the laws of most of the States and of the United States.[1] At military law, however, in England, the same were not formally sanctioned by usage,[2] and are now precluded by statute:[3] in the American military code only challenges for legal cause have ever been permitted.[4]

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[1] Field officers' courts, however, are not subject to challenge under the Article, "because, being composed of but one member, there is no authority competent to pass upon the validity of the challenge." DIGEST, 99–100.

[2] Simmons § 340; DIGEST, 136. In the Joint Resolution of Congress, of Feb. 13, 1874, authorizing the special Inquiry in the case of Brig. Gen. Howard, it was provided,—"that the accused may be allowed the same right of challenge as allowed by law in trials by court-martial." This exceptional provision would have been unnecessary if the right had *legally* attached to courts of inquiry in general at military law.

[3] That the right is "mutual" or "reciprocal," *i. e.* possessed by the judge advocate equally with the accused, see Adye, 167; Tytler, 225; Hough, 944; Id., (P.) 664; McNaghten, 103; Hughes, 41; Macomb, 31; Maltby, 28; O'Brien, 240; De Hart, 118; Benét, 70; Lee, 60; G. O. 11, Dept. of Cal., 1865.

[4] Maltby, 28; De Hart, 114, 118.

A "cause stated" is, properly, not merely a general statement or assertion, as that the member is prejudiced, biased, &c. The facts and circumstances in which the alleged prejudice, &c., is deemed to consist should in each case be set forth, to fully meet the requirement of the Article. The objection should be specific, or as much so as the challenger can reasonably make it."[5]

"The Court * * * shall not Receive a Challenge to More than One Member at a Time." That is to say, challenges to the *array*[6] shall not be entertained; or, as Simmons expresses it, "a prisoner cannot challenge the court generally," or "the whole of the members collectively."[7] Thus objections which go to the jurisdiction, constitution, composition, &c., of the court *as a body* cannot be entertained by a court-martial *as challenges* under the present Article.[8] And, though the accused may deem all the members to be prejudiced or otherwise personally subject to exception, and though his grounds of objection may be the same to each member, he cannot include them all in a general challenge, but is permitted to challenge them singly only.[1] He may indeed challenge all in succession if he see fit,[2] but the court will only receive and pass upon a challenge to one member at a time, not entertaining a further objection till that previously offered has been determined.[3]

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[1] See Sec. 819, Rev. Sts.

[2] Williamson, 85; 2 McArthur, 273, 275; Tytler, 221; Simmons § 500; Kennedy, 51; Griffiths, 47; Bombay, R., 11.

[3] Army Act § 51.

[4] As has been well said by Gen. Terry,—"the allowance of a challenge is not a matter of discretion," but one to be determined "in accordance with established principles and rules of law." G. C. M. O. 134, Dept. of Dakota, 1884.

[5] DIGEST, 101. And compare Mann *v.* Glover, 2 Green, (N. J.,) 203

[6] So called in reference to the whole body of jurors as "arrayed, or arranged on the panel."

[7] § 496. And see DIGEST, 102–3; G. C. M. O. 8, Dept. of the Platte, 1873. In Capt. Drane's case, (1847,) the accused challenged the array on the ground that not one-half of the members were his superiors in rank; the objection was not sustained. In Com. Wilkes' case, in 1864, the accused challenged the array on the ground that the Secretary of the Navy, who, in accordance with a peculiar usage confined to the navy, had preferred the charges, had also selected the court. The court refused to entertain the challenge.

[8] Compare Brooks *v.* Davis, 17 Pick. 150; Clark *v.* Van Vracken, 20 Barb. 281.

Where a party has several distinct grounds of objection to one member, the better practice is for the court to require that they be offered separately, in such order as the party may prefer.

II. PROCEDURE UNDER THE ARTICLE.

At what stage Challenges may be Offered. The regular and appropriate occasion for the interposing of challenges is when the accused, by the reading of the order or orders detailing the court, is informed as to the members present, and before the court is sworn.[4] It is then that the accused is formally asked by the judge advocate, in accordance with the army regulation heretofore cited, if he has "any objection to any member," and it is then that, (like the prisoner before a civil court at the corresponding point of its proceedings,) he must present such objections as he knows or believes to exist, if he desires to take advantage of the same. If at this time he fails to present such objections, he is held to have *waived* them, and cannot be allowed to interpose them at any subsequent stage.[5]

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[1] See G. C. M. O. 8, Dept. of the Platte, 1873.

[2] Simmons § 497, note; DIGEST, 103; G. O. 37, Dept. of Kans., 1864; 5 Opins. At. Gen., 707.

[3] Simmons § 497. In a case in G O. 24, Dept. of the Platte, 1869, the proceedings were disapproved because of the action of the court in entertaining a challenge offered by the accused to two members at the same time, "in violation of the plain provisions" of the Article.

[4] Hough, 943; Griffiths, 47; De Hart, 125. "The regular practice is to challenge jurors as they come to the book to be sworn." People *v.* Damon, 13 Wend. 352. "The proper time for challenging is between the appearance and swearing of the jurors." Williams *v.* State, 3 Kelly, 453.

[5] Not replying or offering an objection when the question is put "may be considered by the court as tantamount to his having *no* objection." D'Aguilar, 101. "If a cause of challenge known to the prisoner prior to his arraignment has been waived by him, it cannot subsequently be urged." De Hart, 125. And see DIGEST, 102. "The rule of the common law is that neither party has a right of challenge after the juror is sworn, for cause then existing." U. S. *v.*

But valid objections may exist at this time, not known to the accused, (or to his counsel, if he has one,[1]) and of the existence of which he could not by reasonable diligence have been informed.[2] In such event, it is permitted to the accused, (as to the prisoner under similar circumstances at a criminal trial,[3]) to take his exception as soon as the facts justifying it are brought to his knowledge, although this may not be till some time after the court has been sworn and at a late stage of the trial.[4] Again, pending the trial, a member who has been duly sworn at the proper time, and has taken part in the proceedings, may, by some expression of opinion or other act, render himself, as may a juror under similar circumstances, subject to challenge, and he may thereupon be challenged accordingly, whatever be the stage of the proceedings.[5] In all such cases the military practice, in the

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Morris, 1 Curtis, 35. "If a party knows of any prejudice entertained by a juror, and makes no exception when the jury is empanelled, however good his cause of challenge then is, it must be deemed to be waived." Fox *v.* Hazleton, 10 Pick. 277. And see case of Lieut. Armstrong, 17 Opins. At. Gen. 397.

[1] The rule that—"the knowledge of the counsel is the knowledge of the party, and notice to him is notice to the party," (State *v.* Fuller, 34 Conn. 280,) while applicable to military cases, would not ordinarily be so strictly applied as in a civil case.

[2] The furnishing to the accused before the trial of a copy of the order detailing the court has already, (see Chapter XIII,) been recommended as affording him an opportunity to prepare such challenges as he may propose to offer when the court assembles.

[3] "It has always been held that if a juror prejudge the case, and it is unknown" at the outset, "it is ground for challenge subsequently." Sellers *v.* State, 3 Scam. 416. In this case, and others, new trials were granted because a juror, on being challenged and interrogated before he was sworn, had stated that he had not formed or expressed an opinion, whereas it subsequently appeared that he had in fact done so.

Where the party, "though knowing of the objection, forgot to raise it at the proper time," he is not entitled to raise it subsequently. Barlow *v.* State, 2 Blackf. 114. "If the party, before the juror is sworn, neglects to avail himself of means of information readily accessible by which he could inform himself of the objection, the law fixes him with knowledge, and will not allow him to take advantage of his laches." See Bailey *v.* Trumbull, 31 Conn. 581; Quinebaug Bk. *v.* Leavens, 20 Id. 87; Fox *v.* Hazleton, 10 Pick. 277; Gillespie *v.* State, 8 Yerg. 507.

[4] See Tytler, 231; Hough, 943, note; Id., (A.) 49; McNaghten, 173; De Hart, 124.

[5] "It has always been allowable to challenge a juror after he is

interest of justice, follows that of the civil courts, in allowing the challenge to be interposed.[1] The occasions, however, of challenges offered to members of courts-martial, after the court has been sworn, whether for causes previously existing but not known or for causes subsequently arising, are extremely rare.

Order of Challenges. In the British law, objections to members are raised in the order of their rank, beginning with the lowest in rank.[2] In our practice no such rule obtains; the accused, (or judge advocate,) being permitted to challenge members, where he objects to more than one, in such order as he may deem expedient.

Form of presenting Challenges. A party availing himself of the opportunity of challenge may state his objection verbally or in writing. In our practice, challenges are generally expressed orally: the court, however, in a proper case, as where the grounds of objection are exceptional in their nature, or vaguely declared, or are apparently frivolous or actuated by personal feeling, may require the challenge to be presented in writing. As observed by De Hart,[3] the challenge should "always be stated in becoming and respectful terms"—a rule particularly to be observed where personal prejudice or hostility is ascribed to the member. The court may properly decline to entertain a challenge clearly frivolous,[4] as well as one expressed in unnec-

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sworn for a cause thereafter arising, for the reason that the act of the juror which constitutes the new ground of challenge places him in the same relation to the remaining portion of the trial as that in which a juror challengeable at the outset stands to the whole investigation; for the trial after the arising of the new ground can be no more impartial than can be the trial from the beginning with a juror biased or otherwise disqualified in advance." People *v.* Bodine, 1 Edmonds, 44. And see State *v.* Fuller, 34 Conn. 280; Mynatt *v.* Hubbs, 6 Heisk. 322, and cases cited.

[1] Where an accused officer, having a valid objection to a member of the court, omitted to raise it at all at the trial, it was held that he must be deemed to have consented to the court as composed, and was estopped from raising the objection at a later period as ground for impeaching the validity of the sentence. Lieut. Keyes' Case,—in DIGEST, 102, 15 Opins. At. Gen., 432, and 15 Ct. Cl., 533; also 17 Opins. 397.

[2] Rules of Procedure § 25, (E.;) Simmons § 497.

[3] Page 116.

[4] See De Hart, 118, 127; G. O. 13, Dept. of the Potomac, 1867.

essarily offensive language. But where the challenge merely states facts, which if proved will constitute a valid objection, the court cannot refuse to consider the same, however grave or injurious to the member may be the charge involved.

The court, according to the practice already noted, will require the party, where he has several distinct grounds of objection to a member, to present them *seriatim*, and will consider and pass upon the same separately, precisely as if they were challenges to separate members. Under the pretext or form of a second or further objection, a party should not be permitted to reiterate, in substance, an objection already overruled.[1]

Response to the Challenge by the Member. The objection being presented, the member excepted to may or may not respond to the same, in his discretion.[2] If he does so, admitting that the objection as stated exists, and the same is a valid and relevant one, the court will properly hold the challenge to be sustained; indeed, in such a case the member himself will often express a wish to be excused.[3] If, on the contrary, he does not admit the facts alleged, he may, by a statement or explanation, (which he is always at liberty to make,[4]) satisfy the challenging

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[1] Compare Mann *v.* Glover, 2 Green, 195. As already indicated, where a valid ground of challenge exists which the accused, through ignorance, fails to present in a proper form, he should be so instructed and assisted by the judge advocate or the court as to be enabled to have the full benefit of the same. See G. C. M. O. 19, Dept. of the Columbia, 1882.

[2] That the court cannot properly *require* him so to respond, see G. O. 2 of 1858.

The mere statement of an accused, not admitted by the member, is not sufficient to support a challenge. See G. C. M. O. 35, Dept. of Dakota, 1884; Do. 42, Id. 1892. The mere fact that the member does not respond should not necessarily be regarded as an admission of the ground of challenge, and the contrary ruling in G. C. M. O. 74, Div. of Atlantic, 1887, is not, as laying down a general principle, concurred in.

[3] But see *post*, to the effect that the member cannot be excused at his own request, but only on a challenge regularly passed upon and sustained.

[4] "The challenged member may admit and ask to withdraw, or explain." Hough, (P.) 799. "The usual practice is for the member to rise and admit, or deny the truth of the objection, or to explain it." O'Brien, 240. And see Simmons § 500; Bombay, R., 11; DeHart, 115.

In the civil practice, opportunity is afforded to jurors, in justice to themselves, to explain away any injurious imputations involved in the party that he is in error and induce him to withdraw his challenge. Thus it is not unusual for a member objected to for prejudice against the accused, to disclaim having any such feeling or bias as imputed and to state that he is aware of no reason why he cannot judge impartially in the case. Upon such a declaration made in evident good faith, the accused will, in the majority of cases, cease to press his objection.[1]

Trial of the Challenge. But where the statement of the member fails to satisfy the challenging party, and the objection is insisted upon; or where the member makes no response to the challenge, it is open to the party either to submit the question of the validity of the challenge to the court simply upon his own statement and that of the member, if any, or, (as is in general the proper course where the member fails to make an admission or to state facts,) to proceed to try the challenge by the offer of evidence,[2] like any other issue.[3]

This evidence may include not only the testimony of witnesses, as well as such documentary or other written proof as may be relevant,[4] but also the testimony of the member himself brought out upon an examination instituted by the challenging party.

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challenges as offered. Thus in Taylor *v.* Greely, 3 Greenl. 204, the court say:—"The testimony of the juror himself is to be heard in explanation of the language or conduct imputed to him." In McFadden *v.* Com., 23 Pa. St., 17, it is observed:—"A juror, like every other person publicly assailed, ought to be heard in vindication of his character."

[1] O'Brien, 240.

[2] A court should not allow a challenge "upon its mere assertion by the accused without proof, and in the absence of any admission on the part of the member." DIGEST, 101. The admission of an objection unsupported by evidence and "without any reason shown beyond a mere supposition or prejudice of the prisoner, tends in effect to introduce into courts-martial the allowance of peremptory challenge—a practice wholly unknown to our military code." G. C. M. O. 66 of 1875.

[3] That the proceeding upon a contested challenge is a trial upon an issue joined, see Clark *v.* Van Vracken, 20 Barb. 281. "A challenge raises an issue of fact, and unless the fact be admitted by the other side, it is to be determined, like any other issue, upon competent evidence." Gen. Merritt, in G. O. 42, Dept. of Dakota, 1892.

[4] See Simmons § 500; De Hart, 116. That any relevant and proper testimony is competent to show the true state of mind of a challenged juror where his statement or personal examination has failed to disclose bias on his part, see Bickam *v.* Pissant, Coxe, 220; State *v.* Benton, 2 Dev. & Bat., 212; People *v.* Reyes, 5 Cal., 347. "As to the

That the challenging party is entitled, if he desires it, to subject the challenged member to an examination by interrogatories, in the same manner as a juror may be subjected to examination in the criminal practice,[1] is well settled.[2] Some of the authorities indeed refer to this examination as properly had upon oath, like the examination upon the *voir dire* in the civil courts.[3] But our military law makes no provision for swearing the member under the circumstances; and, in the absence of such authority, it is clear that for the court, before it organizes, to assume to administer to him the oath of a witness, or any oath, would be a proceeding without warrant of law.[4] But, though not sworn as such, he is *examined* as a witness,[5] and the examination is therefore to be governed by the rules which specially govern the examination of a juror under similar circumstances, the principal of which is that questions shall not be asked the answers to which will tend to criminate the party, or will directly attach to him disgrace, as by the confession of dishonorable or disreputable

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mode of proving a challenge, the law of evidence is the same as in other cases. Proof may be made by records, papers, or witnesses, either to support the challenge or to disprove it." State *v.* Spencer, 1 Zabr., 199.

[1] "In order to arrive at the condition of the person's mind who is offered as a juror, a party is permitted to ask of the person himself questions the answers to which may tend to show whether he is prejudiced or not in the cause which he is about to undertake to decide." People *v.* Reyes, 5 Cal., 349. And see Lohman *v.* People, 1 Comst. 384; Justices *v.* Plank R. Co., 15 Ga., 54; State *v.* Benton, 2 Dev. & Bat. 222.

[2] O'Brien, 240; G. O. 21 of 1853. In this Order and also in G. O. 8, Div. Pacific, 1870, the proceedings of a trial were disapproved because the right of personal examination of the member was denied to the accused by the court.

[3] See O'Brien, 239; Ives, 92; G. O. 35 of 1867.

[4] "The court must decide on the *assertion* of the party challenging, of the officer challenged, and of the witnesses examined; for it has no authority to receive evidence *on oath*, before the administration of the prescribed oath to the members." Simmons § 500. And see, to a similar effect, De Hart, 116; DIGEST, 101. At this stage indeed of the proceedings, no oath whatever can legally be administered either by the president or judge advocate.

[But *now* such oath might perhaps be regarded as authorized under s. 4, c. 272, of the Act of July 27, 1862.]

[5] "The juror becomes merely a witness, and he may be examined as a witness. He will be exempt from answering such questions as witnesses are exempt from answering, and from no others." Justices *v.* Plank R. Co., 15 Ga., 55.

acts.[1] The exemption, however, from answering such questions is held, in the case of a juror, to be a *personal privilege* which may be *waived.*[2]

As to the *other* witnesses who may be offered, these also cannot be sworn; no authority to swear witnesses at this stage being conferred by the code of Articles or other statute.[3]

It is to be added that the other party, if he thinks proper to contest the challenge, may take part in the examination by putting questions in the nature of cross-interrogatories to the member or witnesses. He may also introduce counter-witnesses or other evidence relevant to the issue.[4] It is very rare, however, that the trial of a military challenge is thus far extended.

Either party, or both parties, may make argument upon the evidence.

Challenge by the Judge Advocate. The challenges desired to be offered on the part of the prosecution, if any, are in practice interposed *after* the full exercise of his right by the accused,[5] and in a similar form and manner.

The Deliberation by the Court. The trial of the challenge, which is commonly conducted in open court, having been completed, the court is in general cleared for deliberation upon and determination of the matter of the objection,—a proceeding, it may be remarked, for which it is not required to be, and is not in practice, sworn.[6] Where indeed the ground of challenge, admitted or shown to exist, is manifestly valid, (as in the case of a challenge distinguished, as will hereafter be indicated, in the civil practice as a challenge "for principal cause,") the court need not go through the form of clearing, but may well pass upon and allow the challenge at once as they sit.

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[1] O'Brien, 239; G. O. 21 of 1853. "A juror may be asked such questions as do not tend to his infamy or disgrace." 5 Bac. Abr., 367. "It cannot be asked a juror if he has been either charged with, imprisoned for, or convicted of, a crime." Jones *v.* State, 2 Blackf. 477. The exemption of a member of a court-martial from being required to give criminating testimony should be held to include testimony implicating him either in a military or a civil offence.

If the inquiries addressed to the member by the accused bring out unfavorable opinions of the accused himself, these, if given in good faith, are "official and privileged." G. O. 2 of 1858. It is added in this Order that if an answer "goes too far" in injurious reference to the accused, "the court should interpose."

[2] Boon *v.* State, 1 Kelly, 622; Sprouse *v.* Com., 2 Va. Cas., 375.

[3] [But see *now* the provision of the Act of July 27, 1862, noted on the previous page.]

[4] Compare State *v.* Spencer, 1 Zabr., 199, as cited in note *ante.*

[5] Hough, 944, note; Id., (A.) 45; De Hart, 125.

[6] See De Hart, 116.

Upon a clearing or deliberation, the challenged member usually and properly withdraws from the court, that is to say, does not remain with it:[1] if however he stays, he takes no part in the discussion or decision. His remaining cannot indeed affect the validity of the proceedings, but his withdrawal is desirable as promoting freedom of discussion[2] and may properly be requested by the court. In an early leading case,[3] a member of a general court-martial, for a refusal, *expressed in grossly disrespectful terms*, to retire when so requested, was brought to trial and convicted upon a charge of "conduct to the prejudice of good order and military discipline." The member indeed cannot be compelled to withdraw against his will, nor will the mere fact of his omitting or declining to withdraw constitute a military offence, but in general his sense of propriety and justice will induce him to retire of his own accord and as a matter of course.

That the court, including the challenged member, may consist of but five persons, can constitute no reason why he should not withdraw. That four members of a general court are competent, at this stage of the proceedings, to determine the matter of a challenge offered to a fifth member, is well settled in our law:[4]

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[1] Hough, (P.) 779; Id., (A.) 48; Simmons § 500; Kennedy, 51; Napier, 87; Griffiths, 47; Bombay R., 11; Hughes, 42; Macomb, 31; De Hart, 115; Benét, 69; Coppée, 65; DIGEST, 101.

Under the Act of July 27, 1892, the judge advocate retires here, with the accused, equally as at a final deliberation on the judgment.

[2] Simmons § 500, (edit. of 1863.) Attorney General Cushing, in remarking, (7 Opins., 284,) upon "the course to be pursued by an arbitrator, judge, or other member of a plural body," when for any legal cause "precluded from participating in the decision" of such a body, observes that "it is generally held that in such case he ought not to participate in the deliberation which precedes the decision. The reason assigned," he adds, is that "if the person who has not the right to concur in the decision, participate in the deliberation, or be so much as present even, it is impossible to know whether he has or has not influenced the result."

[3] See G. O. 1 of 1858.

[4] O'Brien, 240; DIGEST, 88. And see G. O. 24, Dept. of the Platte, 1869; G. C. M. O. 10, Dept. of Texas, 1873.

the member does not cease to be a member because of being challenged. So, also, two members of a regimental or garrison court may, and must, pass upon an exception taken to the remaining member. But where, of a general court consisting of five members, four have duly allowed a challenge to the fifth member, who has accordingly retired from the court, the four remaining are not competent to entertain a further challenge; that is to say, three of the remaining four cannot legally pass upon a challenge to the other member.[1]

In deliberating upon the subject of the challenge as offered, it will be for the court to inquire, *first*, whether the ground of objection advanced is a valid one; *secondly*, whether its existence in the particular case is established. What are valid grounds of challenge at military law will be considered presently. As to the question of the sufficiency of the proof, the court will properly bear in mind two principles: *1st*, that the burden of maintaining the challenge, and establishing that the member does not stand indifferent,[2] rests upon the challenging party, and that a member, like a juror, is presumed to be qualified till he is shown to be the contrary;[3] *2d*, that where any reasonable doubt exists of the indifference of the member in the case to be tried, it will be safer and in the interest of justice to sustain the objection and excuse him.[4] And this although the court may thus be reduced below the legal minimum and it may not be convenient to recomplete it. For, the convenience of the service is less to be regarded than the obligation to administer justice. The majority of military writers certainly lean rather in favor of supporting challenges than rejecting them, and the proceedings of courts-martial have been not unfrequently disapproved in General Orders for the reason that valid objections to members have failed to be allowed.[2]

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[1] This was actually done in one case; the proceeding being of course disapproved by the reviewing authority. See G. C. M. O. 72, Dept. of Dakota, 1882.

[2] "The law aims to exclude bias, &c., from a jury so far as the infirmity of human nature and the imperfections of human institutions will permit." State *v.* Benton, 2 Dev. & Bat. 215. "Exact and absolute impartiality is not to be had. The utmost that can be attained is that jurors should be as impartial as the lot of humanity will permit." Com. *v.* Hill, 4 Allen, 591. And see Burr's Trial, 370, 416.

[3] U. S. *v.* Watkins, 3 Cranch C., 579; State *v.* Benton, 2 Dev. & Bat. 214; People *v.* Stout, 4 Parker, 108; Stewart *v.* State, 15 Ohio, 155; Holt *v.* People, 13 Mich., 227; People *v.* Brotherton, 47 Cal., 388.

[4] Black *v.* State, 42 Texas, 377; R. R. Co. *v.* Munkers, 11 Kans., 223; Holt *v.* People, 13 Mich., 224.

The Determination of the Challenge. After such free interchange of views as may be desirable, a vote, in the manner prescribed by Art. 95, is taken upon the objection;[3] the question to be voted upon being—Shall the challenge be allowed? A majority of course decides. Where there is a tie, it should be held, upon the analogy of all deliberative assemblies,[4] that the objection is not sustained; and to this effect has also been the practice of the civil courts.[5] Simmons[6] indeed declares that "when the votes are equally divided the decision is given in favor of the challenge being allowed," and this statement has been repeated by O'Brien.[7] In the absence, however, of positive law or regulation, such a rule could rest only upon usage, and no usage to this effect can be said to exist in our service. So, the British rule that where there is a tie vote upon a challenge, the president of the court shall have a casting vote,[8] has not—it need hardly be observed—been adopted in our law. In the procedure of American courts-martial, a tie vote upon an objection to a member, as

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[1] Kennedy, 54; Napier, 94; De Hart, 115; Benét, 69;. Coppée, 67; G. C. M. O. 66 of 1875; G. O. 13, Dept. of the Potomac, 1867.

[2] See G. C. M. O. 82 of 1868; G. O. 16, Dept. of the Ohio, 1865; Do. 11, Dept. of Cal., 1865; Do. 13, Dept. of the Potomac, 1867; Do. 14, Dept. of La., 1868; Do. 20, Dept. of Arizona, 1870; Do. 45, Dept. of the South, 1873; Do. 5, Dept. of the Gulf, 1873; Do. 36, 47, Dept of Dakota, 1874; Do. 15, Id., 1875; G. C. M. O. 10, 71, Dept. of Texas, 1873; Do. 44, Id., 1875; Memo., Dept. of the Columbia, June 19, 1874. But "while courts are prone—and justly so—to deal liberally with prisoners in the matter of challenges, it should not be forgotten that this right to protection may degenerate into a means for annoying officers against whom prisoners are prejudiced." G. C. M. O. 35, Dept. of Dakota, 1884. (Gen. Terry.)

[3] See Pipon & Col., 51.

[4] "An equal division upon a question is a decision of it in the negative." This, on the ground that—"the votes given for the negative" are "sufficient in number to neutralize the votes given on the other side." Cushing, Law and Practice of Legislative Assemblies § 303.

[5] See U. S. *v.* Watkins, 3 Cranch C., 443.

[6] § 497. And to this effect is now the statute law, as to challenges of members other than the president. Army Act § 51. (5.)

[7] Page 240.

[8] Army Act § 53. (8.)

upon any other proposition, is *no vote*, *i. e.* is not the indispensable majority, and the objection is not sustained.[1]

Procedure upon a Decision. The court having come to a conclusion upon the cause of challenge assigned, the doors, (the court having cleared,) are opened, and, the parties and the member who had retired being present, the decision is announced by the president. If it is that the challenge is not sustained, the member retakes his seat and the proceedings continue in the regular course. If the reverse is the result, and the member is, as it is commonly phrased, "excused," he withdraws permanently; whereupon the court, if five members still remain, goes on with its business.[2] If the sustaining of the challenge has reduced the number to four, the court, as it cannot legally proceed, adjourns and reports the fact through its president to the convening authority. The latter, if he deems it expedient, will issue an order adding to the court a member or members, or detailing a new court altogether.[3] As already indicated, members thus added will be liable to challenge in the usual manner; and, in the event of a new court being appointed, embracing any of the members of the former court, these will become again subject to challenge in the same manner as when upon the original detail.[4]

A Member excusable only upon Challenge. It remains to remark that the proceeding authorized by Art. 88 is the only one by which a member may be relieved from attendance by the court. Nothing is now better settled in our military law than that, except upon a challenge duly made and sustained, the court is not empowered, for any reason or purpose, to excuse a member;[5]

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[1] See DIGEST, 747.

[2] After a challenge interposed by the accused has been acted upon, it is proper for the judge advocate to ask him if he has any "further objections." G. C. M. O. 67, Dept. of Dakota, 1882.

[3] In the British practice, members excused or challenged may be replaced by officers detailed to attend the court for the purpose and called "waiting officers." Rules of Procedure § 17, (D.,) and Second Appendix. At an early period in our army a similar purpose was served by "supernumerary" officers. De Hart, 115; O'Brien, 240. This practice has been referred to in Chapter XII.

[4] De Hart, 89.

[5] DIGEST, 103. And see G. C. M. O. 27, 33, Dept. of Dakota, 1881; Do. 13, Id., 1887; Do. 25, Id., 1889; Do. 62, Id., 1889, and 26, Dept. of the Mo., 1889, (where a member was excused to act as counsel for

nor, of course, can a member in any case excuse *himself.*[1] Simmons[2] and Kennedy[3] have sanctioned the court's permitting a member, excepted to for personal prejudice or hostility, to withdraw voluntarily if he desires it, without his objection being regularly passed upon; and their view has been inconsiderately repeated by O'Brien,[4] and De Hart.[5] Our Article, however, clearly conveys no authority for the excusing by the court of members at their own request, and such action has been repeatedly condemned in General Orders.[6] Where an officer detailed upon a court-martial deems himself disqualified, from prejudice or otherwise, to sit upon a particular trial, he should, if there is time, communicate the facts to the convening authority and ask to be relieved.[7] Where this cannot be done prior to the trial, the member, before being sworn, should make known the fact of the objection either directly to the party interested in raising the same,[8] or preferably to the court in the presence of the parties, so that one or the other party may formally take the exception unless he elects to waive it.[9]

III. THE GROUNDS OF CHALLENGE.

Classification. At the common law, the causes for challenge to jurors were divided into four classes: those *propter honoris respectum*, (on account of a respect for nobility;) *propter delictum*, (on account of crime;) *propter defectum*, (on account of defect,

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the accused;) Do. 30, Dept. of Dakota, 1886, (where the member, a surgeon, was excused to enable him to attend to his medical duties.) It does not affect the absolute illegality of the exercise of the power that the accused does not object. Do. 31, (H. A.,) 1887.

[1] G. O. 66, Dept. of the Platte, 1871, Do. 78, Dept. of Dakota, 1892. *Contra*, see Sackville's Trial—a precedent without authority in this country.

[2] § 500.

[3] Page 54.

[4] Page 239.

[5] Page 118.

[6] See G. O. 21 of 1853; Do. 66, Dept. of the Platte, 1871; Do. 43, Id., 1875; G. C. M. O. 73, Dept. of Texas, 1873; Do. 25, Dept. of Arizona, 1880. *Contra*—G. O. 34, Dept. of the Gulf, 1875.

[7] DIGEST, 103; G. O. 43, Dept. of the Platte, 1875. And see G. C. M. O. 25, Dept. of Arizona, 1880.

[8] See G. C. M. O. 73, Dept. of Texas, 1873.

[9] See G. O. 66, Dept. of the Platte, 1871.

that is to say personal or legal incapacity;) and *propter affectum*, (on account of favor, or bias.[1])

Challenges propter honoris respectum. This kind of challenge, says Coke, could be taken only to a "peere of the realm or lord of parliament, for these, in respect of honor and nobilitie, are not to be sworn on juries."[2] And he adds:—"When any of the commons is to have a tryall, either at the King's suit, or between partie and partie, a peere of the realm shall not be impanelled in any case."[3] It need hardly be observed that no challenge, answering to or resembling this one, is known to the procedure of the courts of this country, where every man is the peer of every other man before the law.

Challenges propter delictum. The term "*delictum*" refers to an infamous crime, that is to say a crime affixing infamy, in the legal sense, upon the offender,—as a capital crime or a felony.[4] Of the crime which is the ground of challenge the juror must have been duly convicted, and the proper proof to sustain the challenge is the *record* of such conviction.[5] An instance of a valid challenge of this class would be most rare in the military practice, and no case is known in which one has been interposed.

Challenges propter defectum. Challenges of this class are of two kinds: 1. Those based upon some physical or mental defect; 2. Those based upon an incapacity created by law.

1. Of the former class—"unsoundness of mind, or such defect of the mind or the organs of the body as render him incapable of performing the duties of a juror,"[6] as also sickness, deafness, and intoxication,[7] are specified by the authorities as causes properly exempting a juror from serving, and constituting ground of chal-

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[1] Co. Litt. 156, b. And see Simmons § 502.

[2] Co. Litt., 156, b.

[3] Id. And see 2 Gabbett, 391.

[4] Co. Litt., 158, a; State *v.* Squaires, 2 Nev. 230; Tytler, 225; Adye, 176.

[5] 2 Hawkins, c. 43, s. 25; Tytler, 225; Adye, 176.

[6] State *v.* Squaires, 2 Nev. 230.

[7] Schœffler *v.* State, 3 Wis. 828; Jesse *v.* State, 20 Ga. 164; Pierce *v.* State, 13 N. H. 555.

lenge. So, at military law, Hough[1] states it is one of "the legitimate causes of challenge" that the officer from age, deafness or other infirmity, is incompetent to discharge the duties of a member."

2. The legal incapacity upon which the *second* class of challenges *propter defectum* is based is one created by statute or established by the common law. Certain of the incapacities at common law, as alienage and minority, are adopted by the statutes of most of the States as legal disqualifications in the case of jurors, and, under the provisions of Sec. 800, Rev. Sts., the same facts would be held to be valid grounds of challenge in the federal courts.

But neither alienage nor minority would be recognized as such grounds at military law, where neither the age, nativity, nor civil status of officers is matter of positive statutory regulation, and where it is required of members of courts-martial in general simply that they shall be commissioned officers, and shall have military rank.[2] If indeed a member has not been duly commissioned or appointed, or if his commission has been vacated by operation of law under Sec. 1222 or 1223, Rev. Sts., by his accepting or exercising the functions of a civil office, or his accepting or holding an appointment in the diplomatic or consular service, he will be challengeable *propter defectum*. So, if he has not military rank—as would be the case if one of the permanent professors of the Military Academy were to be detailed upon a court-martial[3]—he would be similarly challengeable.

Further, a challenge of this class will be valid in a case of an officer incapacitated by statute from sitting upon the particular or any court. Thus an officer of the regular army detailed upon a court for the trial of militia, or an officer of marines placed on a military court when not detached for service with the army, or a retired officer sitting upon any court-martial, would be subject to challenge *propter defectum*.

Challenges propter affectum. This is by far the most numerous class of challenges taken to jurors, and so to members of military courts. It includes all the grounds and facts of objection from which an inference of bias or partiality on the part of the juror or member must be, or may be, inferred.

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[1] Page 943, note. "The members should not be deaf, or blind, or laboring under any illness that may prevent their constant attendance." Id., 48. And see D'Aguilar, 102.

[2] Chapter VII, *ante*.

[3] See Chapter VII, *ante*.

Challenges for principal cause and for favor. Here may be noted an old distinction in the law of challenge, especially applied to challenges *propter affectum*,[1] by which challenges to jurors are distinguished as (1) challenges "for cause" or "for principal cause," (sometimes termed "principal challenges,") and (2) challenges "to the favor," or "for favor."

Of "*principal*" challenges of this class the cause alleged is a specific fact of such a nature that, being admitted or proved to exist, it raises *per se*, and necessarily, a presumption of bias or prejudice which cannot be rebutted and the effect of which is absolutely to exclude the juror. Of such causes, among the most conspicuous are the following;—declared enmity; fixed and decided opinion on the merits; having been summoned as a material witness on the merits; relationship within a certain degree; direct personal interest in the result of the trial; having served on the grand jury which found the indictment; having sat upon a former trial of the defendant; having conscientious scruples which will influence a verdict.

Of challenges of this class "*for favor*," that is to say for being in favor of one side or the other, the grounds are not such as, of themselves, imply bias; the question of their sufficiency in law being wholly contingent upon the testimony, which may or may not, according to the character and significance of all the circumstances, raise a presumption of partiality. Such are challenges founded upon the personal relations of the juror and one of the parties to the case; their relationship, when not so near as to constitute "principal cause;" the entertaining by the juror of a qualified opinion or impression in regard to the merits of the case; his having an unfavorable opinion of the character or conduct of the prisoner; his having taken part in a previous trial of the prisoner for a different offence, or of another person for the same or a similar offence; or some other incident, no matter what, (for the grounds of challenges "to the favor" are as various as the influences that affect human feeling,[1]) which, alone or in combination with other incidents, may have so acted upon the juror that his mind is not "in a state of neutrality" between the parties. In brief, as remarked by the court in a leading case, the distinction between these two classes of challenges is that, in the former, the conclusion that the juror is incompetent is a conclusion of *law* on ascertained facts; in the latter, the question whether he is so or not, is a question of *fact* to be determined by the particular circumstances in evidence.[2]

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[1] It may be remarked that the challenges of the three classes already noticed—*propter honoris respectum*, *propter delictum*, and *propter defectum*, are all properly "principal" challenges; the privilege, crime, or incapacity, in any case, needing but to be shown to exist to substantiate the objection as a matter of course.

Special grounds. Keeping this distinction in mind as of value in passing upon military as well as civil cases, we will proceed to consider the chief grounds of challenge of the present class,—*propter affectum*,—which, as has been said, comprises the great majority of the exceptions which come to be taken to members of courts-martial. Some of these will be found to be peculiar to the military practice, but the greater part are common to that both of civil and military courts.

These grounds of exception will be examined in order under the following heads:—1. Opinion formed or expressed; 2. Interest; 3. Relationship; 4. Personal prejudice or hostility; 5. Intimate or peculiar personal relations; 6. Having taken part in a former trial or inquiry; 7. Being a material witness in the case; 8. Miscellaneous grounds.

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[1] "A challenge to favor applies to any man where there is sufficient reason to suspect he may be more favorable to one side than to the other." Rollins *v.* Ames, 1 N. H. 350.

[2] People *v.* Bodine, 1 Denio, 308. And see Freeman *v.* People, 4 Id., 9; People *v.* Stout, 4 Parker, 110; Mann *v.* Glover, 2 Green, 204.

"Principal" challenges were heretofore specially distinguished in practice from challenges to the favor in that while the former were passed upon by the court, the latter were determined by sworn "triers"—two indifferent persons, usually members of the bar, or jurymen already found competent—who, being designated for the purpose by the court, heard the evidence *pro* and *contra*, and decided, as a question of fact, whether the juror was biased. Now, however, in a considerable number of the States, as also in the federal practice, (see Sec. 819, Rev. Sts.,) triers are done away with, and all disputed challenges are decided by the court.

For this reason Thompson, Law of Trials, vol. 1, p. 47, is of opinion that "the distinction between these two kinds of challenges has so far disappeared in this country that it may now be disregarded." In illustrating, however, the science of this branch of the law, it is still of interest and of use.

Opinion Formed or Expressed—***Expressed opinion. It need not proceed from ill will.*** Whether an opinion formed and expressed upon a case shall be held to affect the competency of a juror, or a member of a court-martial, properly depends upon its nature and extent, irrespective of any personal feeling of ill will, or the reverse, on the part of the juror or member;[1] such personal feeling in fact, when entertained, being treated as a separate and distinct ground of challenge.

Must be positive and definite. The opinion, properly to disqualify the juror or member, should be a positive and unqualified one. As remarked by the court in an adjudged case,[2] an opinion, necessarily to exclude a juror from the panel, must be "absolute, unconditional, definite and settled, in distinction from one which is hypothetical, conditional, indefinite and uncertain. The mind must be, for the time being, settled and at rest upon the question of the prisoner's guilt, or upon the question to be tried."[3] Such an opinion would ordinarily be one either based upon personal knowledge of the facts, or acquired from some reliable source—as from a party to the case, from hearing the evidence upon a previous trial or preliminary investigation, from conversations with witnesses, &c. But if the opinion be positively fixed and definite, it is not essential that the source from which it is imbibed should be an authentic one. If the mind of the juror or member be possessed by a clear and settled opinion, it should be held to disqualify him, however or whencesoever derived.[1] A decided opinion, it may be added, need not be expressed in a public manner: Hough[2] mentions a case of an opinion, casually expressed in private, which was held sufficient ground of challenge.

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[1] The opposite common law doctrine that the expressed opinion, to constitute valid cause of challenge, must proceed from ill will or malice, (King *v.* Edmonds, 4 B. & Ald. 471,) has (except in New Jersey—State *v.* Spencer, 1 Zabr. 198; State *v.* Fox, 1 Dutch., 588,) never prevailed in this country.

[2] People *v.* Stout, 4 Parker, 109.

[3] The decided opinion must of course be serious, not "jocular." Monroe *v.* State, 23 Texas, 210. It must also be one made in good faith, not for the purpose of getting rid of serving as a juror. U. S. *v.* DeVaughan, 3 Cranch C., 84. Where a juror, in expressing a positive opinion on the merits, had also expressed a wish for the success of one of the parties to the suit, the court, in holding the opinion a sufficient ground for setting aside the juror, added:—"Much more is the actual wish or desire that one party should so prevail, a good cause. Such wish or desire is partiality itself, not merely evidence of partiality." Justices *v.* Plank R. Co., 15 Ga. 54.

Transient opinion or impression, insufficient. On the other hand, an impression or cursory opinion upon the merits of a case or the guilt or innocence of the accused, which has taken no decided hold upon the mind, and will fail to influence the judgment in the presence of sworn testimony, will not, as it is held generally by the authorities, properly exclude a juror or member of a military court, upon challenge. Such, chiefly, are the slight impressions or shifting opinions so frequently formed upon public rumor or common report, as well as those gathered from such material as the gossip of acquaintances, casual conversations with persons who were not witnesses and have no personal knowledge of the facts and, especially, articles in *newspapers*.[3] In a case in New York, the court, referring to impressions derived from the source last mentioned, remark:—"It is quite obvious that if jurors are on such grounds to be rejected, it will be impossible at the present day to administer justice in cases sufficiently exciting to inspire a newspaper paragraph."[1]

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[1] "It is the preconceived opinion that renders him incompetent, and not the source from which that opinion is formed or derived." State *v.* Gillick, 7 Iowa, 307. If the opinion be decided, it is no matter that it be formed "from the report or hearsay of others. Many men form their opinions from the statements of their neighbors in whom they have confidence. Indeed, there are many men who have more confidence in the expressed opinions of their intelligent neighbors than they have in their own." Reynolds *v.* State, 1 Kelly, 229. The fact that a juror has made up his mind on *insufficient* grounds is held *especially* to indicate a disqualifying bias. See 1 Burr's Trial, 370.

[2] Precedents, 715.

[3] The general rule that a juror must be superior to all exception "must not be carried to such a length as to run the risk of defeating the ends of justice by excluding from the panel persons who have expressed an indefinite opinion of the merits of a case, where * * * it has become a subject of general conversation." Irvine *v.* Bank, 2 W. & S., 190. "Sustaining challenges on (such) slight grounds tends to place the administration of public justice in the hands of the most ignorant and least discriminating portion of the community, by whom the safety of the accused may be endangered and the proper administration of the laws put to hazard." Moran *v.* Com., 9 Leigh, 651.

Hypothetical opinions. Of this general description are also the opinions characterized in the books as "hypothetical;" that is to say, opinions derived chiefly from rumor, hearsay, or other imperfect information, which, proceeding upon the supposition "that the facts are as they have been represented or assumed to be," take, when expressed, a hypothetical form. As where the juror declares that he has formed an opinion, if what he has heard is true; or, if what he has heard or read is true, he believes the prisoner to be guilty or innocent, as the case may be. This belief, the continuance of which is conditional upon the proof on the trial according with the information of the juror, is held, in general, not to constitute a sufficient ground of challenge.[2]

Test of intermediate opinions. Where the opinion of the juror is something more than slight, but at the same time is not positive, being in fact an opinion falling between the two extremes described, this test of its sufficiency to exclude upon challenge has been applied by the courts, *viz.—whether it is so fixed as to require evidence to remove it.* If the answer of the juror when interrogated on this point, or the drift of the evidence on the hearing, is in the affirmative, it is held to be generally safer to conclude that his mind is so far preoccupied as to render him incompetent.[1] In a case in California,[2] where a juror stated, upon challenge, that he had formed an opinion which it would require evidence to remove, the court observe:—"In the mind of this juror" the prisoner "is held guilty before a single witness testifies against him; reversing the rule of law that presumes a person innocent until his guilt is *prima facie* established by evidence."

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[1] Sanchez *v.* People, 4 Parker, 535. And see State *v.* Medlicott, 9 Kans., 280; People *v.* Mather, 4 Wend., 230; People *v.* Bodine, 1 Edmonds, 56; People *v.* Hayes, Id., 582; U. S. *v.* McHenry, 6 Blatchford, 503; 1 Burr's Trial, 370; Hall *v.* Commonwealth, 89 Va., 171.

[2] In State *v.* Sater, 8 Iowa, 420, the hypothetical opinion held not to disqualify the juror was—"if what he had heard should be proved upon the trial, he had an opinion made up." In Burk *v.* State, 27 Ind., 432. the court observe of a similar declaration: "It was equivalent to saying—'if the facts shall be as I have heard, then I have an opinion; if not, then I have none; and I have no opinion as to the truth of those facts.'" Upon the general principle that hypothetical opinions do not disqualify, see further—State *v.* Potter, 18 Conn., 166; People *v.* Mather, 4 Wend., 243; Durell *v.* Mosher, 8 Johns., 445; People *v.* Fuller, 2 Parker, 17; People *v.* Stout, 4 Parker, 71; Mann *v.* Glover, 2 Green, 201; State *v.* Benton, 2 Dev. & Bat., 213; Haugen *v.* Ry. Co., 53 N. W., 769; State *v.* Sheerin, 12 Mont., 539; Thompson, Law of Trials, vol 1, p. 74.

But the drift of the more recent rulings is to the effect that, though the opinion of a juror be so far fixed that it will require evidence to remove it, yet if he feels assured, and so declares or makes oath, that he can impartially try the case and give a verdict in accordance with the testimony on the trial, he will properly be accepted as competent, and this especially where his opinion has been formed upon report or rumor.[3]

The opinion should be as to guilt or innocence. It is a general rule that the opinion of the juror, to affect his competency, should be one upon the merits of the case, that is to say—where a verdict is to be rendered—upon the guilt or innocence of the accused.[4] Thus, as he held in several cases, a belief merely that a homicide or a murder has been committed is not an opinion as to the guilt of the party charged.[5] Nor, as ruled in a further case,[6] is a belief, that the prisoner killed the person for whose murder he is indicted, such an opinion; for "the killing," as remarked by the court, "being but one element of the crime, is consistent with the prisoner's innocence of murder." A general unfavorable opinion of the prisoner as a bad man has been held insufficient *per se* to disqualify a juror;[1] and the same has been held as to the entertaining of such an opinion in regard to persons in general when charged with crime,[2] or in regard to violence and crime in general.[3]

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[1] Cancemi *v.* People, 16 N. Y., 501; Fahnestock *v.* State, 23 Ind., 231; Moses *v.* State, 10 Humph., 456; Cotton *v.* State, 31 Miss., 504; Alfred *v.* State, 37 Miss., 296; Olive *v.* State, 11 Neb., 1; Vance *v.* State, 19 S. W., 1066; People *v.* Shufeldt, 61 Mich., 237; Halsted *v.* Manhattan Ry. Co., 11 N. Y. S., 44. But where the declaration of the juror was to the effect that, while it would require *some* evidence to change his opinion, the same would readily yield to evidence, he was held to be competent. Guetig *v.* State, 66 Ind., 94.

[2] People *v.* Gehr, 8 Cal., 359. And see Sam *v.* State, 13 Sm. & M., 190.

[3] State *v.* Williamson, 106 Mo., 162; Blair *v.* State, 5 Ohio Cir. Ct., 496; Greenfield *v.* People, 74 N. Y., 277; Com. *v.* McMillan, 144 Pa. St., 610; Washington *v.* Com., 86 Va., 405; State *v.* Dent, 41 La. An., 1082; State *v.* Baker, 33 W. Va., 319; Reed *v.* State, 32 Texas, Cr., 25; People *v.* Wah Lee Mon., 59 Hun., 626; Thompson, Law of Trials, vol. 1, p. 78. And see Guetig *v.* State, noted above.

[4] Where the juror entertains a decided opinion as to guilt or innocence, it is held to be unnecessary, and in fact improper, to ask him whether it, (the opinion,) is that the prisoner is guilty or innocent. State *v.* Shelledy, 8 Iowa, 503; People *v.* Williams, 6 Cal., 206.

[5] See O'Brien *v.* People, 48 Barb., 274; State *v.* Thompson, 9 Iowa, 188; Cargen *v.* People, 39 Mich., 549.

[6] Lowenberg *v.* People, 27 N. Y., 336.

An opinion upon a question of *law* involved in a case will or will not disqualify a juror or member, according as it does or does not amount to an opinion upon the guilt or innocence of the accused. A juror or member who was of opinion that the act charged was not a crime or offence would properly be held incompetent on challenge.[4] So a fixed opinion that a statute under which a party is indicted is unconstitutional must necessarily disqualify a juror, since it involves a conclusion that he is not guilty in law;[5] but an opinion that the statute is constitutional and in force has been held not to affect the juror's competency, since it is merely an opinion upon an abstract legal question.[6] Similarly it was held no objection to jurors that they thought the law under which the prisoner was accused "a good law;" for, as the court remark, "such opinion has no tendency to prove or disprove the issue."[7]

Where a juror had no opinion, or only a hypothetical opinion, on the merits, it was held that the fact that he had made up his mind as to the *punishment* proper to be inflicted on the prisoner in case of a conviction, did not affect his competency.[8]

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[1] Monroe *v.* State, 23 Texas, 210; People *v.* Mahoney, 18 Cal., 180; Anderson *v.* State, 14 Ga., 710; G. C. M. O. 44, Dept. of Cal., 1883. Otherwise, however, where such opinion has become so fixed as apparently to bias the mind. See Willis *v.* State, 12 Ga., 444.

[2] People *v.* Reynolds, 16 Cal., 129.

[3] Davis *v.* Hunter, 7 Ala., (N. S.,) 135.

[4] 1 Bishop, C. P., § 917; Com. *v.* Buzzell, 16 Pick., 153.

[5] Com. *v.* Austin, 7 Gray, 51; Pierce *v.* State, 13 N. H., 536.

[6] Com. *v.* Abbott, 13 Met., 120.

[7] McNall *v.* McClure, 1 Lans., 32. And see U. S. *v.* Noelke, 17 Blatchford, 554.

[8] State *v.* Bill, 15 La. An., 114. And see Com. *v.* Buzzell, 16 Pick., 155.

Effect of personal disclaimer of bias in connection with opinion. The assertion of a juror under examination that his opinion in regard to the case is not such as to influence his action on the trial will properly carry considerable weight except where such opinion is one of a decided character, as where it will require positive evidence to remove it. In that event his personal declaration that the opinion will not bias his judgment or affect his verdict, will not in general,—it has frequently been held,—avail of itself alone to remove the objection taken to him upon challenge.[1] But the authorities are not uniform upon this point, and the effect, as above noticed, of sundry of the more recent rulings is to accept the juror where his disclaimer is a confident one.

In a case of a challenged member of a court-martial, while a disclaimer by him of bias will always be deferred to with respect, the same—it is believed—will properly fail to convince the court of his neutrality in the case where it appears that he has recently entertained decided views concerning the criminality of the accused.[2]

Opinion Formed but not Expressed In the great majority of cases of challenge for opinion, the opinion entertained by the juror has naturally also been expressed, and thus in fact made known to exist. In a comparatively few cases only has the question come to be raised whether the mere formation of an opinion, without its being expressed at all, will affect the juror's competency. In Callender's case,[3] (tried in 1800,) it was held by Chase J. that the juror "must have delivered as well as formed the opinion." This doctrine was affirmed upon Burr's trial, (in 1807,) by Chief Justice Marshall in the following terms:—"The rule is, that a man must not only have formed but declared an opinion in order to exclude him from serving on the jury."[1] The same view has been taken in some of the subsequent cases; the ground being mainly that persons are more apt to be tenacious of and to abide by expressed opinions than those which remain unexpressed.[2] The opposite, however, *viz*:—that an opinion once fully formed in the mind, though not stated, will disqualify equally as if declared,—has been held in other and more numerous cases.[3] Upon principle, the latter ruling certainly seems the one to be preferred. It is the formation of the opinion which is the material and principal process; the expression is but incidental. The formation constitutes the prejudgment and preoccupation of the mind; and if the opinion is already decided, it scarcely becomes more so by being expressed. Some habitually silent persons do not readily assert their convictions; and some who are secretive brood over them till they become even the more intense for not being uttered. Some again hesitate to declare their sentiments concerning the acts of others, either from an aversion to gossip and scandal, or from a sense of honor and justice which will not permit them to do a possible injury in a case of any doubt, or in one in which there may be extenuating circumstances. Thus the better reasons are deemed to be clearly on the side of holding that the *expression* of the opinion should not be regarded as essential to disqualify the juror or member of court-martial, upon challenge, where the same is admitted or clearly shown to have been deliberatively formed and to be of a decided character.

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[1] Sam *v.* State, 13 Sm. & M., 194; Morton *v.* State, 1 Kans., 472; Armistead *v.* Com., 11 Leigh, 663; Goodwin *v.* Blachley, 4 Ind., 440; Willis *v.* State, 12 Ga., 447; Hudgins *v.* State, 2 Kelly, 176; People *v.* Gehr, 8 Cal., 362; Olive *v.* State, 11 Neb., 1; Greenfield *v.* People, 74 N. Y., 277. It is "not to be considered as any disparagement of the *bona fides* of the juror" that he should be held incompetent notwithstanding such a declaration. Willis *v.* State. In Hudgins *v.* State, the court offer a natural explanation which, no doubt, accounts for many cases in which this declaration is made, in good faith, by jurors:—"The juror may think himself free from bias or prejudice because he harbors no grudge or personal ill will toward the accused."

[2] See DIGEST, 100; G. C. M. O. 66 of 1879. In a case in G. C. M. O. 23, Dept. of Dakota, 1888, where a challenged member had investigated the case, and preferred the charges, it was held that the challenge should have been sustained, notwithstanding a disclaimer of present prejudice by the member.

[3] Wharton's State Trials, 697.

Opinion Formed or Expressed in the Preferring of Charges. The subject of challenges for opinion may be concluded by noticing the class of military cases in which the fact that a member of the court-martial was the officer who *preferred*

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[1] 1 Burr's Trial, 44.

[2] Boardman *v.* Wood, 3 Verm., 570; Noble *v.* People, Breese, 30. And see State *v.* Morea, 2 Ala., (N. S.,) 277.

[3] State *v.* Potter, 18 Conn., 172, and cases cited; Com. *v.* Buzzell, 16 Pick., 155; Rathbun *v.* People, 21 Wend., 509; State *v.* Johnson, Walker, (Miss.,) 399.

the charges has been urged as ground of objection, generally on the part of the accused. In repeated cases, published in General Orders, where it appeared that a member had preferred or initiated the charge, and had done so, not ministerially under the orders of a superior, but after a personal investigation of the facts, and was thus actually the accuser,[1] a challenge offered to him has been held valid; and, where the court has ruled otherwise their ruling has been disapproved.[2]

The objection in this class of cases is aggravated where the member challenged as having preferred the charges is also the person primarily affected by the offence committed,—as where the charge is that his own order was disobeyed by the accused,[3] or that disrespect was shown himself,[4] or that his own property was stolen,[5] &c.,—especially as, in such cases, he is also generally the principal, or a material, witness.[1] Here, indeed, an additional objection—that of personal prejudice or hostility—may combine with that of having formed or expressed an opinion.

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[1] See construction of the terms "accuser and prosecutor," (in Art. 72,) in Chapter VI; also DIGEST, 100.

[2] "It is difficult to believe that an officer who has made a preliminary examination into alleged facts, and has so far satisfied himself of the guilt of the accused as, in effect, to prefer charges against him," (involving here grave offences,) "can bring to the trial of the case a mind so free from bias as to ensure to the accused the impartial trial to which he has an undoubted right." G. C. M. O. 82 of 1868. (Gen. Grant.) The deliberate preferring of charges by the member was "a most unequivocal expression of opinion." G. C. M. O. 1, Dept. of Texas, 1880. (Gen. Ord.) And see G. O. 16, Dept. of the Ohio, 1865; Do. 14, Dept. of La., 1868; Do. 20, Dept. of Arizona, 1870; Do. 45, 57, Dept. of the South, 1873; Do. 5, Dept. of the Gulf, 1873; Do. 36, Dept. of Dakota, 1874; Do. 18, Id., 1875; G. C. M. O. 13, Dept. of the Platte, 1873; Do. 10, 71, Dept. of Texas, 1873; Do. 44, Id., 1875; Memo., Dept. of the Col., June 19, 1874; Do. 88, Dept. of the Mo., 1883; Do. 18, Dept. of the East, 1884; Do. 2, Id., 1894; Do. 44, Dept. of Texas, 1893; Do. 23, Dept. of the Platte, 1884. See also, in this connection, G. O. 37, Dept. of Kans., 1864, where the fact that the same *court* had previously caused to be preferred against the accused the very charge upon which he was arraigned was held valid ground of challenge to *all* the members, severally, as being "evidence of the formation of an opinion" on the merits, and indeed "tantamount to an expression of that opinion."

On the trial of Col. T. H. Cushing in 1811, (Printed Trial, p. 7,) the accused objected to a member on the ground that he had *intended* to prefer charges against the accused identical in part with those in the case. The member admitting the fact, the objection was sustained.

[3] DIGEST, 100.

[4] See case in G. C. M. O. 13, Dept. of the Platte, 1873; also Trial of Lieut. Stanley, U. S. N., p. 323.

[5] Simmons § 507.

Personal Prejudice and Hostility. Under this head are intended to be included:—1, Decided prejudice not amounting to positive enmity; 2, Feelings of actual enmity, animosity, malice or confirmed ill will.

Personal prejudice. The term "prejudice," as here employed, is to be distinguished from prejudice in its original sense of prejudgment. In *this* sense it has already been considered in treating of *opinion:* in its present sense it has reference to a sentiment in regard to the accused personally, *i. e.* as an individual or as an officer or soldier.[2]

The personal prejudice under consideration may be proved by evidence of any decided unfriendly or unfavorable language, opinion, action, &c., of the juror or member challenged. Thus it was held good cause of exception to a member that he had applied abusive and degrading epithets to the accused, (a soldier,) on the occasion of his arrest.[3] So, a decided expression of opinion by a member as to the unfitness of the accused, (an officer,) for any official position was held to charge him with sufficient prejudice to constitute ground of challenge.[4] Prejudice may also be implied from the relation of the member toward the subject matter of the charge, as where the violence or other misconduct for which the accused is to be tried was aimed at the member himself or resulted to his injury.[1]

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[1] DIGEST, 100; G. C. M. O. 51, Dept. of the Col., 1881; Do. 19, Id., 1882.

[2] As to the effect of personal prejudices in biasing the mind of a juror, see Mann *v.* Glover, 2 Green, 203.

[3] G O. 47, Dept. of Dakota, 1874.

[4] G. O. 11, Dept. of Cal., 1865. That the objection must be *personal* is illustrated in a case, published in G. O. 72, Dept. of the East, 1865, of a volunteer soldier, where the action of the court in allowing a challenge to a member on the "absurd" ground that he had a known and avowed prejudice against volunteer soldiers in general, was disapproved by the reviewing authority. So, on the Trial by Military Commission, in 1864, of Milligan and others, page 73, an objection interposed by Milligan to a member who was a volunteer colonel from Mass.,—"because he is from a locality where there are extreme prejudices against Western men, and he is likely to be influenced by those prejudices,"—was, of course, disallowed. See in this connection the case referred to in DIGEST, 77, where the fact that a member had stated that he did not consider the accused officer a gentleman was held a good ground of objection, one of the charges to be tried

Whether expressed or implied, the prejudice must be of a definite and positive character. A general objection interposed by the accused to a member on account of "some unpleasant circumstances growing out of their official relations" was held in Gen. Twigg's case to be indefinite and insufficient.[2]

Prejudice of commanding officer. Simmons,[3] (who is repeated by some of the later authorities,[4]) states in general terms that challenges have been admitted to members as being the commanding officers of accused persons, on the supposition that they might as such be prejudiced through "previous imperfect or *ex parte* knowledge of the circumstances inducing the trial." It is quite clear, however, that the mere fact that a member is the commanding officer—colonel, captain, &c.—of the accused is no foundation for a valid challenge.[5] Other circumstances must be shown fixing *actual* prejudice on the commander before an objection taken to him can properly be held sufficient. In our practice, the principal instances in which a challenge to a member who was a commanding officer has been sustained have been those of cases in which either he was the preferrer of the charge or real accuser,[6] or those in which other causes combined to disqualify

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being "Conduct unbecoming an officer and a gentleman." The sufficiency of this ground, however, may well be questioned.

On the trial of Capt. Kelly of the British navy in 1802, (Printed Trial, p. 3-4,) the court sustained a challenge by the accused to a member who had sat on a previous court-martial held for the trial of two seamen of his, (the accused's,) ship, which court, in its judgment, had "conveyed a censure" on the accused.

[1] DIGEST, 100.

[2] G. O. 4 of 1858.

[3] § 510.

[4] De Hart, 122; Benét, 73; Coppée, 65.

[5] DIGEST, 100; G. O. 73, Dept. of the South, 1873.

[6] See G. O. 13, Dept. of the Potomac, 1867; Do. 16, Dept. of the Ohio, 1865; Ives, 91. Simmons (§ 510) writes that a challenge of a member as being a commanding officer should "obviously be allowed" where he has "taken an active part in promoting the prosecution or in bringing forward the charge." See G. C. M. O. 18, Dept of the East, 1884.

him—as that he was a material witness for the prosecution, or the very person against whom the offence of the accused has been committed.[1]

That it is in general inexpedient that the immediate commander of an accused, officer or soldier, should be placed upon a court ordered for his trial, is remarked by Simmons and subsequent writers.[2] In small commands, however, it is sometimes unavoidable.

Personal hostility, enmity, or malice. This is a valid ground of challenge equally in the civil and the military practice. In a case in Georgia[3] the court observe:—"The law requires that jurors should be * * * not liable to an objection on account of malice, ill will, hatred, revenge, * * * or the like." On Burr's trial,[4] a certain grand juror was objected to for that he "entertained a bitter personal animosity against" the defendant; and a sentiment of this nature being admitted by the juror to exist, the challenge was sustained. That the feeling must be a personal one, directed at the individual, and that it need have no connection with the facts of the particular case, has also been specifically held.[5]

Among military authorities, Tytler[6] mentions "malice or hostile enmity expressed by word or deed against the prisoner," as one of the "causes of challenge impossible to be overruled;" and other later authorities notice the same as among the decided grounds of exception.[7]

The existence of the hostile feeling is generally shown by the language or acts of the challenged juror or member—as his having charged the challenging party with a grave crime;[8] his having publicly libelled him;[9] his having initiated against him a malicious suit or prosecution,[1] or grave charges on personal grounds; his having had a serious quarrel or difficulty with him in a personal or official capacity; his having been foiled or antagonized by him in a contest for appointment, promotion, &c.; his having been in *any* manner injured by the challenging party and consequently cherishing revenge or bitterness against him,[2] &c. In an adjudged case[3] the point is noticed that hostility once felt but no longer entertained will not properly affect the competency of the juror.

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[1] See Trial of Lieut. Stanley, (U. S. N.) p. 323.

[2] See—with Simmons § 510—Harcourt, 110; Bombay R., 7; De Hart, 122.

[3] Monroe *v.* State, 5 Ga., 142.

[4] Vol. 1, p. 41–43.

[5] Brittain *v.* Allen, 2 Dev., 120.

[6] Page 225.

[7] See Simmons § 503; Kennedy, 54; Maltby, 30; Macomb, 31; O'Brien, 238, 239; Ives, 91.

[8] Palmer *v.* Bogan, Cheves, 52.

[9] Lewis *v.* Few, Anthon, 75.

Interest. Personal interest—pecuniary or other—in the result of a trial is a cause of challenge which has been chiefly confined to jurors in civil actions. The principle involved, however, is applicable to criminal cases; so that a juror or member who has a direct personal interest in the fact or question involved or to be decided, *i. e.* to whom any reasonably certain substantial advantage or detriment may result from the event of the proceeding, ought not, if objected to, to be permitted to sit on the court. This ground of challenge has been recognized by some military writers,[4] but, except in a single instance, it is one that is most rarely urged.

Claim to promotion. This instance is that of the objection sometimes taken by an accused officer to a member, that the latter will become entitled to promotion on account of seniority, upon the accused being dismissed the service.[5] This objection is especially apposite in cases where a sentence of dismissal is mandatory upon a conviction of the offence charged. It may, however, also properly be made in a case where a dismissal may legally be imposed in the discretion of the court, and where, in view of the nature of the charge, such sentence is a probable one. It may also not improperly be taken in a case where a sentence of suspension for a certain term would be a reasonable and appropriate punishment for the offence, and where within such term a right to promotion, by reason of the compulsory retirement of a common senior, or otherwise, would accrue to the member if the accused were to be deprived of the same by the execution of such sentence.

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[1] Co. Litt., 157, b.; People *v.* Bodine, 1 Denio, 305.

[2] See Coppèe, 66. As where the member was the very person against whom the offence had been committed. G. C. M. O. 13, Dept. of the Platte, 1873.

[3] People *v.* Vermilyea, 7 Cow. 369.

[4] O'Brien, 238; De Hart, 119.

[5] Clode, M. L., 127; Benét, 73; Coppée, 66; Ives, 90; DIGEST, 101

Advancement in files. That a member will by the dismissal of the accused be merely advanced one "file" or number in the line of seniority toward promotion will in the majority of cases be too remote an interest to form a valid objection.[1] Cases however may occur in which such interest is not thus remote, and the court may in its discretion properly sustain the exception,—as where the number to which the member will be advanced is the *first* in the line of promotion to a higher grade; or where it is the *second*, and the senior officer at the head of the list is soon to be retired, or, by reason of the compulsory retirement of a common senior or otherwise, to be promoted.

Relationship. No instance is known in which this ground of challenge—familiar to the common law[2] and recognized in the modern civil practice[3]—has ever been taken to a member of a court-martial. The detailing upon such a court of an officer so nearly related to the accused as to make it proper for the judge advocate to object to him on the ground of relationship must needs be of the rarest occurrence. That a member was a near relative of the judge advocate would not, *per se*, warrant a challenge on the part of the accused. Where, however, a near relationship existed between a member and the officer who preferred the charges and was prosecuting witness, or between a member and the person immediately injured or affected by the alleged offence of the accused,[1] ground for an exception by the latter might well exist. In such cases indeed it would not be the kinship of the parties which would constitute the legal objection, but the close personal relation and affiliation to be implied therefrom.

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[1] DIGEST, 101.

[2] "For that the law presumeth that one kinsman doth favor another before a stranger." Co. Litt., 157, a. And at an early period the rule was adopted that the relationship must be within the ninth degree to exclude a juror. Finch's Law, 401; 1 Chitty, C. L., 541; 3 Black. Com., 363; 1 Bishop, C. P. § 901; Simmons § 504. This is still the general rule in the United States, except where a different one may have been substituted by statute. The law of descent of the *civil* law, however, has been adopted in this country instead of that of the *canon* law followed in England. See Churchill *v.* Churchill, 12 Vt. 661.

[3] See the American authorities above cited; also 1 Burr's Trial, 415; Jacques *v.* Com., 10 Grat. 690; State *v.* Perry, 1 Bus. L., 331; Schœffler *v.* State, 3 Wis. 828; O'Connor *v.* State, 9 Fla. 215.

Intimate Personal Relations. Under the old common law a considerable significance was attached to the existence of personal relations between a juryman and a party to a legal proceeding, implying friendship, fellowship, dependence, &c.[2] Later, Blackstone[3] designated as causes of "*principal* challenge," that the juror "is the party's master, servant, counsellor, steward or attorney, or of some society or corporation with him." At present, however, all such situations would generally be considered as affording grounds of challenge "to the *favor*" only; the question whether the relations of the juror and party were so intimate that the former could not well stand indifferent on the trial being determined in each case by the special circumstances in evidence.[4]

Cases, however, of this general class would not be frequent in the military practice. That a member, for instance, was of the same company or regiment as the accused,[5] or even that the accused was his commanding officer, would not, of itself, be regarded as a valid ground of challenge on the part of the judge advocate. In such cases other circumstances must combine and be exhibited in evidence to establish between the parties that intimate relation which would properly constitute adequate cause of objection to the member. Hough[1] cites a case where two members of a court-martial, "who had been the private advisers, counsellors, and associates of the prisoner up to the very day of trial," were held properly excluded, upon a challenge taken by the judge advocate: here the relation of friendship was combined with one analogous to that of counsel and client.[2] Where indeed a member of a military court is *in fact* subject to be biased by any intimate friendly, social, or other personal relation binding him to the accused, he should be set aside upon the challenge of the judge advocate with the same reason that a member subject to be biased by a hostility entertained toward the accused should be set aside upon an objection interposed by the latter.

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[1] See Jacques *v.* Com., 10 Grat. 690.

[2] Co. Litt., 157, b.

[3] 3 Com., 363.

[4] See Mann *v.* Glover, 2 Green, 204. The objection noticed by Blackstone, that the juror is "of some society or corporation with" the party has not been favored by courts in this country. Thus in a leading case in New York—Purple *v.* Horton, 13 Wend. 9—the court say that such a doctrine "would exclude every stockholder in the same bank, every member in the same church, and every associate of the same benevolent society;" and it is accordingly held not to be a valid ground of challenge to a juror by a party to a suit that the juror and the other party are both *freemasons*. In a further case in the same State—People *v.* Jewett, 3 Wend. 314—it is declared to be no objection that jurors belong to "any particular association or fraternity."

The mere fact of an *intimate acquaintance* between a juror and the accused will not constitute ground of challenge. Moore *v.* Cass, 10 Kans. 288.

[5] Simmons § 509; Hough, (A.) 51; D'Aguilar, 102; De Hart, 124.

Having Taken Part in a Former Trial or Inquiry. This ground of challenge, which is but another aspect of the general subject of challenge for *opinion*, will be considered under the following heads:—1. Former trial of the same case; 2. Former trial of a different case involving the same or a similar question; 3. Having been a member of a previous court of inquiry in the same case; 4. Having been a member of a regimental court from which an appeal is taken under Art. 30.

Former trial of the same case. It is a settled principle of the civil procedure that where a juror in a case has taken part in a verdict, or in a vote upon a verdict, (as where the jurors were divided,) at a previous trial of the same case, he is *necessarily* incompetent to sit in the pending case and will be set aside on challenge. This, "not," to cite the language of Chief Justice Marshall on Burr's Trial,[3] that he is "suspected of personal prejudices, but" that "he has formed and delivered an opinion and is therefore deemed to be unfit to be a juror in the cause."

Otherwise, where there was no verdict or vote upon a verdict at the previous trial,—as where the case was dismissed by the court without proceeding to verdict. In such a case the juror is not challengeable "for principal cause,"[1] though, if his mind has been in any manner biased,—as by his having heard evidence, arguments, &c., he will be liable to challenge "for favor."[2]

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[1] Precedents, 664.

[2] In a case in G. C. M. O. 23, Dept. of Texas, 1887, a challenge was interposed by the Judge Advocate, (but not sustained by the court,) on the ground that the member challenged had assisted the accused in the preparation of his case, and had interested himself too much in his behalf to be quite impartial on the trial.

[3] Vol. 1, p. 416. And see Herndon *v.* Bradshaw, 4 Bibb, 45; Briggs *v.* Byrd, 12 Ire., 377; State *v.* Fox, 1 Dutch. 595; State *v.* Benton, 2 Dev. & Bat., 213.

Similarly an officer of the army, who had been a member of a court-martial on a certain trial, would properly be excluded from acting upon a new trial for the same offence where one had been ordered or granted;[3] and this whether or not the former court had jurisdiction of the case, or whether the proceedings of the former trial were legal or illegal. Thus Attorney General Grundy, in holding that the proceedings in a certain naval court-martial had been invalidated by a fatal omission therein, and that, in order to the trial of the accused, a new court must be organized, adds:—"The officers who sat on the former should all be excluded from the second trial. They have formed and expressed opinions upon the case which would disqualify them from serving as jurors in a criminal case in a common law court; and I can see no reason why officers under the same circumstances should not be excluded from a court-martial, especially as they are the triers of the facts as well as the law."[4]

But where the proceedings were terminated before a finding was reached, as by the number being reduced below a minimum, or the entry of a *nolle prosequi*, or because of some military exigency, an officer who was a member would not properly be excluded upon challenge from the subsequent court or trial, unless it appeared that the effect of the previous investigation had been so to bias his judgment that he no longer stood indifferent between the parties.

Former trial of a different case involving the same or a similar question. In the criminal law, neither the fact that a juror has served as such on a previous trial of the same party for a separate instance of the same offence or for a similar offence;[5]

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[1] Durell *v.* Mosher, 8 Johns., 445. And see Atkinson *v.* Allen, 12 Vt. 621.

[2] See Whitner *v.* Hamlin, 12 Fla., 18, (a case deemed otherwise of doubtful authority.)

[3] And so would a member or members who had acted on "a previous court by which the same accused had been tried for the same act, though under a different charge." DIGEST, 101.

[4] 3 Opins., 398.

[5] Com. *v.* Hill, Allen, 591; U. S. *v.* Watkins, 3 Cr. C., 443.

nor that he has taken part in the trial and conviction of another and distinct offender separately indicted for an offence of the same character;[1] nor even that he has similarly acted upon the trial of an accomplice jointly indicted for the same offence but who has been permitted to sever for trial,[2]—is held to be a "principal cause" of challenge, *i. e.* necessarily to disqualify the juror. A challenge "to the favor," however, may be allowed in such cases, where it is satisfactorily shown that the juror, by reason of having heard the testimony on the first trial, or otherwise, has actually become biased by an opinion for or against the present defendant.[3]

In cases of this class at military law a similar test is to be employed. While it is certainly not *per se* valid ground of challenge to a member that he has taken part in a previous trial of the accused for a like offence, or in a trial for the same offence of another officer or soldier between whom and the present accused there had been criminal concert, yet if the previous hearing has induced the formation of an opinion as to the guilt or innocence of such accused, the member is of course properly subject to exception.[4]

Having been a member of a previous court of inquiry. The fact that a member of the petit or trial jury in a criminal case was a member of the grand jury which found the indictment has uniformly been held to constitute conclusive ground of principal challenge;[5] and so the fact that a member of a court-martial was a member of a court of inquiry previously held in the same case has been regarded at military law as a sound objection to the member.[6] Whether the objection is to be held equally valid where the court of inquiry only reported evidence as where it expressed an opinion in the case, is a question as to which different views appear to have been entertained by military writers, but the weight of authority is in favor of the affirmative[1] and good sense and good reason certainly concur. In the practice of American courts-martial the fact of having been a member of a previous court of inquiry by which the charges were passed upon is uniformly treated as an objection in the nature of a challenge for "principal cause."[2]

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[1] State *v.* Sheeley, 15 Iowa, 404.

[2] U. S. *v.* Wilson, 1 Baldwin, 78; Adye, 174.

[3] U. S. *v.* Wilson, *ante.*

[4] Simmons § 513-9; Macomb, 31; De Hart, 121; Benét, 75.
An officer is not properly competent to sit on a court-martial, who, as a member of a previous *board of survey*, has joined in an opinion or finding unfavorable to the merits of the case to be tried.

[5] Stewart *v.* State, 15 Ohio, 159; Barlow *v.* State, 2 Blatchford, 114; Rice *v.* State, 16 Ind., 298; Gillespie *v.* State, 8 Yerg., 507; State *v.* Benton, 2 Dev. & Bat., 213.

[6] See authorities referred to in next note.

If the investigation by the court of inquiry related not to the actual charges to be tried but to a similar matter or one involving a similar question, the member would properly be held subject to challenge according as such investigation had or not impressed upon him an opinion as to the merits of the case.[3]

Having served on a regimental court from which an appeal is taken. All the anthorities, English and American,[4] agree that in the case of an appeal, (taken in our law under the 30th Article of war,) from a regimental to a general court, a member who has acted on the former court will necessarily be excluded from the latter, upon challenge as for "principal cause." This for the reason that the regimental court, in every such case, has not only formed but expressed a specific opinion and conclusion.

Being a Material Witness. The fact that a juror has been summoned by either party as a material witness in the same proceeding is held to be a "principal cause" of challenge.[5] This on the ground that a witness is likely to be a partisan and either to have a personal prejudice or a decided opinion in the case.[1] Similarly, it is in general a valid exception to a member of a court-martial that he is to be a material witness to the *merits*:[2] otherwise, however, where he is to be called upon simply to testify as to character,[3] or as to some interlocutory point not material to the main issue, or slight detail. It is not essential, however, that the member should have been formally summoned.[4] If it is the fact that he is relied upon and is to be used as a material witness to the merits, he is equally subject to challenge whether he has been summoned or not. Otherwise a party, by avoiding summoning his witness, might secure his remaining on the court, to his own undue advantage and the detriment of public justice.[5]

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[1] That is to say, of those who have expressed a decided opinion on the subject. See Simmons § 512; McNaghten, 177; Hough, (P.) 771; De Hart, 120; Coppée, 66; Benét, 75; Harwood, 68; DIGEST, 101. Hough, (P., 645, note,) well observes—"Whether they *give* an opinion matters not; every man *thinks* an opinion."

[2] See G. O. 11, Dept. of Cal., 1866; also case of Major S. Babcock, C. E., Am. S. P., M. A., vol. 2, p. 805. But in Col. Henley's case, (1778,) in which Gen. Burgoyne was prosecutor, four members, including the president, of the previous court of inquiry served on the court-martial, without challenge or objection being interposed.

[3] See Tytler, 223.

[4] Tytler, 224; Adye, 173; 1 McArthur, 275; Delafons, 137; Hough, 943; Simmons § 508; De Hart, 119; Benét, 75; Coppée, 66.

[5] Co. Litt., 157, a; Com. *v.* Joliffe, 7 Watts, 585. Otherwise, where he is to testify as to a matter not affecting the question of guilt or innocence—as that the place of the offence was in a certain county. State *v.* Vari, 14 S. E., 392.

If a member has given material testimony on a previous trial or investigation of the same case,[6] or on a previous trial or investigation of another case or matter of the same or a similar nature.[7] the question whether he should be allowed to sit in the pending case will depend on the weight of the evidence which may be offered to show either that he is prejudiced or that he has formed an opinion; the objection being in the nature of a challenge "to the favor."

While the mere fact that an officer is to be a material witness in a case to be tried does not *disqualify* him from sitting as a member of the court,[8] it is agreed by the authorities that he should not be detailed as such if it can be avoided without serious prejudice to the service.[1] But in the absence of a challenge he cannot, as heretofore indicated, be excused by the court.

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[1] Com. *v.* Joliffe, *ante.*

[2] See Simmons § 511; D'Aguilar, 102; Bombay R., 12; De Hart, 123; Benét, 74; Coppée, 66; DIGEST, 100. [A somewhat conflicting view in G. C. M. O. 134, Dept. of Dakota, 1884, is, in the opinion of the author, too broadly stated.] *A fortiori* where he is the *prosecuting* witness. It does not make him less objectionable that he is to testify in an official capacity. G. C. M. O. 17, Dept. of the East, 1892.

[3] See authorities cited in last note; also Com. *v.* Joliffe, 7 Watts, 586.

[4] The mere fact that the member was an important or material witness in the case, (whether or not formally summoned,) was held sufficient ground of challenge in cases in G. O. 4, Dept. of the West, 1861; Do. 20, Dept. of Arizona, 1870; Do. 18, Dept. of Dakota, 1875; also on Trial of Lieut. Stanley, (U. S. N.,) p. 323. And see Pipon & Col., 51.

[5] In Com. *v.* Joliffe, 7 Watts, 586, it is remarked by the court that if a party should purposely omit to summon a juror whom he designed to use as a witness, this fact "might be a cause of challenge to the favor."

[6] See Harper *v.* Kean, 11 S. & R., 298.

[7] See Delafons, 136; Hough, (P.) 684.

[8] See authorities cited in next note; also Bell *v.* State, 44, Ala., 393.

If a member is called upon in the midst of a trial to be a material witness, he may then be challenged by the party against whom he is to testify, provided it was not known to this party, at the outset, that he was to be used as a witness.[2] But if not challenged, the court has no power to relieve him, nor can he relieve himself; the order of the convening authority being necessary for such a purpose.[3]

Miscellaneous Grounds. Certain other grounds of challenge which have been recognized as valid in the civil practice may here be noticed. These are—that the juror has been tampered with;[4] that he has been bribed;[5] that he is characterized by a moral obliquity;[6] that he will not convict on circumstantial evidence;[7] that he has taken an oath or assumed an obligation as a member of an association or combination which prevents his standing indifferent between the parties;[8] that he has conscientious scruples in regard to the imposition of the death penalty which will affect his verdict;[9] that he does not speak English;[10] that he has not sufficient intelligence.[11]

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[1] Sullivan, 58; Simmons § 511; Hickman, 17, 246; Clode, M. L., 127; O'Brien, 239; De Hart, 123; Benét, 74; G. O. 11, Dept. of the N. West, 1864. And see Hacker's Trial, 5 How. State T., 1181.

[2] See *ante*, p. 309.

[3] DIGEST, 103. And see, *ante*—"*A member excusable only upon challenge*," p. 318.

[4] Co. Litt., 157, b; Knight *v.* Freeport, 13 Mass., 217.

[5] Co. Litt., 157, b; U. S. *v.* Morris, 1 Curtis C., 35; Tytler, 225; Maltby, 30; O'Brien, 238.

[6] McFadden *v.* Com., 23 Pa. St. 12.

[7] Gates *v.* People, 14 Ills., 433; Jones *v.* State, 57 Miss., 684; State *v.* Pritchard, 15 Nev., 74; Griffin *v.* State, 90 Ala., 596; Blair *v.* State, 5 Ohio Cir. Ct., 496; State *v.* Leabo, 80 Mo., 247.

[8] Fletcher *v.* State, 6 Humph., 249; Com. *v.* Livermore, 4 Gray, 20; People *v.* Reyes, 5 Cal., 347.

[9] U. S. *v.* Cornell, 2 Mason, 104; U. S. *v.* Wilson, 1 Baldwin, 78; U. S. *v.* Ware, 2 Cranch C., 477; and many cases in the State reports. The rule is held to be the same where the death penalty is discretionary, *viz.* where the statute enjoins death *or* some lesser penalty as imprisonment in a penitentiary. Gross *v.* State, 2 Carter, 329.

[10] Fisher *v.* The City, 4 Brewst., 395.

[11] State *v.* Roundtree, 32 La. An., 1144.

None of these grounds are likely to arise in a military case. Should indeed an exception in the nature of any of those mentioned be taken before a court-martial, the determination, under the Article, of its "relevancy and validity" may be assisted by a reference to the authorities here cited under the similar subject.

Concluding Remark—Liability to Challenge not Disqualification. In the course of this Chapter, jurors and members of courts-martial against whom valid causes of objection exist, have, in some instances, been said to be "incompetent" and "disqualified." These words are frequently employed in the reports and treatises as convenient terms, but it must not be inferred from their use that it is intended that the juror or member is, by reason of his liability to challenge, disqualified to act on the court, or that his acting thereon impairs the legality of the proceedings. In an adjudged case in New York,[1] it is held:—"A challenge to a juror does not go to the jurisdiction of the tribunal: though a juror may be incompetent as such, the trial is not invalidated." And in a case in North Carolina[2] the court observe:—"There was good cause of challenge to the juror. But that does not vitiate the trial: * * * by not making the objection the party waived it." So, at military law, where the party entitled, under Art. 88, to object waives, or fails to take, his objection, or where the same, being made, is improperly overruled by the court,—while the reviewing authority may, and, in the latter contingency, generally will, *disapprove* the proceedings, the legal validity of the finding and sentence is, in neither case, affected.[3]

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[1] Clark *v.* Van Vracken, 20 Barb., 281.

[2] Briggs *v.* Byrd, 12 Ire. 381.

[3] Case of Lieut. Keyes, DIGEST, 102; Do., 15 Opins. At. Gen., 432; Do., 15 Ct. Cl., 533; Do., 109 U. S. 336. Opin. of At. Gen., in Lieut. Armstrong's Case, 17 Opins. 397. That an accused does not, by a plea of *guilty*, waive any advantage to which he may be entitled by reason of an improper disallowance by the court of a challenge interposed by him to a member,—see G. C. M. O. 88, Dept. of Dakota, 1878.

CHAPTER XV.

ORGANIZATION—ARRAIGNMENT—CONTINUANCE—NOLLE PROSEQUI.

In this Chapter will be considered the subjects of—I, The Organization of the Court by the swearing and qualifying of the members; II, The Arraignment of the Accused, and herein of Standing mute; III, Continuance and Adjournment; IV, *Nolle Prosequi* or Withdrawal.

I. THE SWEARING OF THE COURT.

The accused (and judge advocate) having fully exercised, or been afforded an opportunity to exercise, the right of challenge of members of the court accorded by Art. 88 of the code, the members, (if at least five in number,) proceed to complete their organization as a court, for the trial, by formally qualifying themselves as prescribed in Art. 84; the oath of the judge advocate being taken, under Art. 85, next subsequently.[1]

The Official Oath. Article 84 is as follows: "*The judge advocate shall administer to each member of the court, before they proceed upon any trial, the following oath, which shall also be taken by all members of regimental and garrison courts-martial: 'You, A. B., do swear that you will well and truly try and determine, according to evidence, the matter now before you, between the United States of America and the prisoner to be tried, and that you will duly administer justice, without partiality, favor or affection, according to the provisions of the rules and articles for the government of the armies of the United States,*

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[1] In a *naval* case, in which the statutory order of the oaths was reversed, this irregularity was held not to have affected the legal validity of the proceedings, inasmuch as the accused took no exception at the time. 13 Opins. At. Gen., 374. And see G. C. M. O. 10, Navy Dept., 1893.

and if any doubt should arise, not explained by said articles, then according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear that you will not divulge the sentence of the court until it shall be published by the proper authority, except to the judge advocate; neither will you disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof, as a witness, by a court of justice, in a due course of law. So help you God.' "[1]

The Administering of the Oath—*To be repeated on every trial.* This oath, being required to be administered to the court before proceeding "upon any trial," must be taken anew before the trial of each and every case tried by the same court.[2] No such procedure is recognized as swearing a court *generally* at the outset for all the cases to be tried by it. The court must be qualified separately for every case precisely as if this were the only case to be adjudicated; such qualifying being an essential preliminary to its being authorized to "try and determine" the same.[3]

The accused to be present. The Article does not require that the oath should be administered in the presence of the accused, and it is not *essential* that he should be present when the same is administered. Being, however, already legally present for the purpose of exercising his rights under Art. 88, he properly continues to be present at the qualifying of the court; and it is a well-established usage of the service, specifically recognized in the Army Regulations—par. 1037—that the oath should be administered in his presence.

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[1] Art. 48 of the Code of James II, from which our Article is in part derived, directs that the members "shall take an oath for the due administration of justice according to these Articles, or, (*where these Articles do not assign any special punishment,*) according to their consciences, the best of their understandings, and the custom of war in the like cases."

[2] See O'Brien, 246; De Hart, 129; Macomb, 34; Benét, 80; Harwood, 76; Army Regs., par. 1037; G. O. 60 of 1873. And compare, as to a similar construction of a corresponding provision of the *militia* code of Mass., Coffin *v.* Wilbour, 7 Pick., 150.

A contrary view expressed by Atty. Gen. Berrien in 1829, (2 Opins., 297,) on the authority of Tytler, (p. 230,) was dissented from by Atty. Gen. Taney in 1831, (2 Opins., 460.) Tytler's view has been long since abandoned in the British practice. See Kennedy, 45; Harcourt, 75; Simmons § 440, 521, 527.

[3] See DIGEST, 96–97; Simmons § 440. In G. C. M. O. 7, Dept. of Cal., 1891, the proceedings were held void where a member who had not been sworn sat on the court during a material part of the trial. In the author's opinion, this would not necessarily require a disapproval, if there were *five* other duly qualified members on the court.

Form of administering. The form of administering the oath is as follows: The Members and the Judge Advocate having risen in their places, the latter reads aloud the form, prefacing it by addressing the members, by name and rank as given in the Order, as follows—"You, A. B., Colonel, &c., C. D., Major, &c., E. F., Captain, &c., (and so on,) do, severally, swear that you will well and truly try and determine," &c.; each member—though this is not an essential feature—properly keeping his right hand raised during the reading,[1] or assenting at the end by an inclination of the head. No Bible or copy of the Evangelists is used in our service.

To be taken by every member separately. The Article requires the administering of the oath to "each member." While all the members present are sworn together at the same time, they are not sworn collectively, *i. e.*, as a court or body, but separately and individually as members. So, a member not present at the organization, but taking his seat later in the day or on another day, must be then separately sworn ; and so must a member subsequently added to the court by the convening authority.[2]

Members may affirm. It is declared in Sec. 1, Rev. Sts., that "in determining the meaning of the Revised Statutes, * * * a requirement of an oath shall be deemed complied with by making affirmation in judicial form." Any member therefore who objects to being sworn may be affirmed; the word "affirm" in the place of "swear" being used in addressing him, as his name occurs in the order of rank, thus: "You, A. B., C. D., &c., do severally swear, and you, E. F., do affirm, &c." In affirming, the reference to the Deity at the end of the oath should be omitted.

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[1] See O'Brien, 240; Macomb, 32; DeHart, 128. The two first named writers state that the members repeat the words of the oath after the judge advocate. This, however, has long since ceased to be the practice.

[2] DIGEST, 97; G. O. 46, 56, Dept. of the East, 1864.

Oath not otherwise to be varied. A member, however, would not be entitled to have the form of the oath further varied as to himself on the ground that, as expressed in the Article or administered in practice, it was not binding upon a person of his religious belief. Every officer of the army, whatever his religious opinions, accepts, on entering the service, the provisions of the military code as obligatory upon him, and he cannot refuse to undertake or to abide by the prescribed obligation in this instance. A member, however, may properly be allowed to *accompany* the ceremony by any form, not inconsistent with the directions of the Article, by which the oath may in his estimate be rendered more obligatory as to himself. Thus a Roman Catholic may take in his hand, &c., a copy of the Evangelists, or an Israelite a copy of the Pentateuch.[1]

The Nature of the Obligation. The oath, which some writers have remarked upon as investing the court with a twofold capacity assimilated to that of judge and jury,[2] contains several distinct engagements which may briefly be noticed here, to be illustrated from time to time hereafter.

These engagements are:—

1. To "try and determine according to evidence." Here the member binds himself not to be influenced by any private knowledge or extraneous information which he may have in regard to the case, but to decide it by the testimony, oral and written, which may be duly laid before the court on the trial.[3]

2. To try, &c., "the matter now before" the court. By these words the members engage to pass upon the specific offences alleged against the accused, of which they will properly have been advised by having had the charges read or laid before them, as heretofore indicated. Moreover, having thus bound themselves to pass upon the particular charges presented, they cannot, after they have once been sworn, legally entertain new or "additional" charges or specifications setting forth further offences. Such new offences must be made the subject of a separate trial by the same court, or be referred for trial to a separate court; or the proceedings before the original court may be discontinued, and the court be re-organized, and re-sworn to try all the charges old and new.[1]

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[1] See Clode, M. L., 126; Simmons § 447.

[2] See Kennedy, 9; Simmons § 440; Benét, 78.

[3] See Adye, 187; G. O. 21, Dept. of the Ohio, 1866; G. C. M. O. 41, Dept. of Texas, 1874. Compare Rex *v.* Rosser, 7 C. & P., 648.

The testimony must be that of course which is introduced upon the particular trial. The court cannot, under its oath, allow its conclusions to be affected by evidence taken at another trial. G. O. 29, Dept. of the Platte, 1869.

3. To "duly administer justice without partiality, favor or affection." This is the obligation, express or implied, of all judges, and secures, or should secure, for the accused, however grave the charges, a perfectly fair trial and full opportunity to make defence. Where the proper challenges have been duly passed upon, the members will be prepared to proceed to administer justice with strict impartiality. If any member, however, is at this stage conscious of any such partiality, favor or affection as would materially influence his judgment in the case, he should apply to the convening authority to be relieved, since he could not properly take the oath.

4. To administer justice, &c., "according to" the Articles of war. The member here undertakes to administer justice, not according to his own private views of justice or his personal opinion as to what the law should be, but in strict compliance with the actual statutory provisions of the military code, relating to the offence or offences charged.[2] The Articles, where their import is not clear, may often be interpreted by a reference to the corresponding articles of the earlier American codes, and of the British code, as construed by the standard authorities.

5. In case of doubt, to administer justice according to his conscience, best understanding, and the custom of war. In certain cases the Articles of war fail fully to define the offence made punishable, and in most cases do not prescribe a particular sentence to be imposed in any event, but leave the punishment to the discretion of the court. In such cases of "doubt," the member will be guided by his "conscience," (*i. e.*, his moral sense, or natural feeling of justice,[1]) and his "understanding," (or intellectual faculty,) in determining whether the accused was actuated by the guilty *animus* essential to the offence charged, and in estimating the amount of criminality involved in his act and thus the measure of punishment adequate thereto. He will also, where necessary or appropriate, recur to the custom of war or military usage, as indicating whether certain acts are to be considered as constituting a certain offence, whether a certain defence is to be regarded as valid and sufficient, whether a particular punishment is or not sanctioned by the practice of the service, &c. But with what is here written is now to be taken into consideration the code of *maximum* punishments, prescribed by the President, for enlisted men, in accordance with the Act of September 27, 1890.

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[1] Simmons § 415, 458; Griffiths, 61; De Hart, 102; Benét, 91; DIGEST, 97; G. C. M. O. 39 of 1867; G. O. 13, Northern Dept., 1864.

[2] DIGEST, 97; G. C. M. O. 41, Dept. of Texas, 1874.

The customs of the service have already, (in Chapter IV,) been treated of as a component part of the law military, and need not therefore be here dwelt upon.

6. Not to divulge the sentence, or the votes or opinions of the members. This—the "obligation of secrecy"—was introduced into the oath at an early period,[2] the purpose of its adoption being described to be to protect the members from such resentment or other prejudice as might ensue upon their personal action on the court being made known, and thus the better to secure their independence and promote the ends of justice.[3] A further purpose might well have been to prevent—in case of conviction—the judgment of the court coming to the knowledge of the accused, and of other persons perhaps implicated with him, till the moment at which it would be legal to proceed with the execution of the sentence, thus guarding against escapes and facilitating the efficient administration of the punishment.

The obligation, how violated. The Article, in imposing this obligation of secrecy, had no doubt mainly in view disclosures made in conversation, or otherwise personally and extra-judicially, by the members. The violations, (few indeed in number,) which have occurred have, however, mainly consisted in statements made in the written record of the trial; as a statement, for instance, that the vote was unanimous; or that all the members concurred in the finding or sentence, or in a vote on a single charge or specification; or that certain members designated composed the majority or the minority upon some *issue*,—as the issue upon a challenge or a special plea,—voted on in the course of the proceedings.[1]

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[1] See O'Brien, 244.

[2] See Clode, M. L., 130.

[3] Tytler, 227–9; 1 McArthur, 306–8; 1 Clode, (M. F.) 168; Stocqueler, Hist. Brit. Army, 50; Macomb, 33; Benét, 78. The obligation is compared by Clode, (M. L., 130) to that which, on grounds of public policy, is imposed by their oath upon grand jurors.

The disclosure of the vote or opinion of a member or members upon any material *interlocutory question*, raised during the trial and passed upon by the court when cleared for deliberation, would also be a substantial violation of the obligation assumed by the oath, although no *issue* were joined upon such question. Otherwise, however, where the question thus acted on was one quite immaterial to the merits of the case.[2]

For a member to disclose *his own* vote or opinion would, as remarked by Hough,[3] be equally at variance with his sworn engagement as if he were to divulge that of another member.

While the members, by the last clause of the oath, are precluded from divulging the *sentence* only, it is clear that a member could not properly divulge the fact of an *acquittal*. Such a disclosure would not indeed be a violation of the *oath*, but, as indicated in considering the obligation of the judge advocate under the 85th Article,[1] it would be a breach of official trust and duty, and would constitute an offence under Art. 62.

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[1] See Sullivan, 78; Tytler, 324; Simmons § 615; De Hart, 179; DIGEST, 98. It is no justification for a statement in the record of the vote on the sentence or other subject, that such statement was intended for the eyes and consideration of the reviewing officer only. G. C. M. O. 28, Dept. of Texas, 1883.

[2] Thus, in G. C. M. O. 113, Dept. of the Mo., 1868, it was held not to be "conduct to the prejudice of good order and military discipline" for a member of a general court to make known the vote and opinion of other members, "given while the court was considering, with closed doors, a subject in no way connected with the case then properly before it for trial;" and it was added by the reviewing officer, (Gen. Sheridan,)—"The oath administered in compliance with the 69th, (now 84th,) Article of war, is binding only in matters pertaining to the case which is actually being tried."

[3] Page 372; Id., (P.) 738. In a case in G. C. M. O. 24, Dept of the Platte, 1875, Gen. Ord disapproved, as contrary to the spirit of Art. 84, the action of the president of the court in adding over his signature to the Finding in the record a statement to the effect that, for reasons specified, he disagreed with the majority in a certain finding,—thus disclosing his own opinion.

The obligation, how discharged. As to the *sentence*,—when the same has been promulgated in General Orders, or otherwise made public by the proper superior authority, the member is no longer bound to secrecy in regard to its terms. As to *votes or opinions* of the members, an individual member is authorized to divulge the same only when "required to give evidence thereof" before "a court of justice."[2] By the term "court of justice" was evidently intended a civil or criminal court of the United States or of a State: a court martial[3] could scarcely have been contemplated.

A member, when duly summoned as a witness before a civil court for the purpose indicated, is not only authorized but obliged, if the testimony required of him on the subject be material, to make the disclosure of the vote, &c., if the same be known to him; and this whether testifying in person or by deposition. It will be contempt if he refuses.[4]

Upon the taking of the oath by the members, the court is *duly organized* for the trial, and the presiding officer may, properly, make formal announcement to that effect.

II. THE ARRAIGNMENT OF THE ACCUSED.

The Accused to be Free of Unnecessary Restraint. The court being now duly qualified and organized for the trial, and the accused being before it and ready to plead, the next proceeding is the formal arraignment. To this the accused, in the military as in the civil procedure, is entitled to come free from shackles, irons or other bonds, except in some extreme case where an attempt to escape or to do violence is to be apprehended;[1] and he is entitled to remain similarly unrestrained pending the trial.[2] A failure, however, strictly to observe this rule will not affect the legal validity of the proceedings.[3]

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[1] See Chapter XIII.

[2] On the trial of Maj. Gen. McDougall, one of the charges of which he was convicted was the relating publicly of matters which had occurred at a Council of War, and disclosing Gen. Heath's opinion thereat. (G. O., Hdqrs., Newburg, August 28, 1782.)

[3] In the late British articles of war, the words "*or a court-martial*" were added after the words "court of justice." In the present Army Act (§ 52) the term employed is—"unless thereunto required in due course of law."

[4] See *In re* Mackenzie, 1 Pa. Law J. R., 356.

Form of Arraignment. The arraignment is the calling of the prisoner to the bar of the court to answer to the charge or charges on which he is to be tried.[4] In the practice of courts-martial it consists in reading to the accused the charges and specifications, and demanding of him whether he is guilty or not guilty of each, separately and in order. The order pursued where there are several charges is to arraign first on the 1st, 2d, and succeeding specifications of the First charge, and then on that charge ; next on the separate specifications of the Second charge, and then on that charge ; and so with the rest. In our practice the arraignment is conducted by the judge advocate, both he and the accused properly standing during the ceremony. Where two or more prisoners are to be tried together on joint charges, each is separately arraigned.

The reading of the charges and specifications, besides being the formal and proper basis for the questions which are to succeed and the answers which are to follow, will be useful in affording the accused an opportunity to compare the copy as previously served upon him with the draft on which he is arraigned and so detect any variance that may exist. It is not, however, *essential* to an arraignment that the charges and specifications be read on this occasion. If they are numerous or elaborate, and if the accused has assured himself that the originals have not been modified since his receipt of the copy, he may well—the court assenting —waive the reading, as at criminal law the defendant may waive the reading, on arraignment, of the indictment.[5]

So, by consent of parties, (and with the assent of the court,) the arraignment may be further simplified by the omission of the questions usually addressed by the judge advocate to the accused as to how he pleads to the several charges, &c., and by the entry in the record of a general plea of guilty or not guilty as made to the whole, or of this plea to a part and a special plea or pleas to another part of the pleadings, or of a special plea or pleas to the whole—as the case may be. Where this form is resorted to, it is generally in connection with a waiver of the reading of the charges.

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[1] 2 Hawkins, c. 28 § 1; 1 Bishop, C. P. § 731; Simmons § 473; Macomb, 30; O'Brien, 235–6; De Hart, 113; G. O. 52, Dept. of the East, 1869; Circ., Dept. of the Mo., Feb. 19, 1872.

[2] See DIGEST, 334, and authorities cited in note.

[3] Circ. No. 11, (H. A.,) 1886.

[4] 2 Hale, 219; 4 Black. Com., 322.

[5] Goodin *v.* State, 16 Ohio St., 344–7. And see 1 Bishop, C. P. § 733.

Answer of the Accused. The *answer* to the arraignment, (which is no part of the arraignment itself,) will ordinarily consist of the plea of the *general issue* or of a *special plea.* In some cases, in lieu of a plea, a *motion*—as a motion to quash or strike out—will be first made. It is possible, however, that the accused will make no answer whatever to the arraignment, but will remain wholly silent. Before proceeding, therefore, to consider in a separate Chapter the subject of Pleas and Motions, we will pause here to notice the rare contingency of *standing mute.*

STANDING MUTE.

The Law on the Subject. At an early period of the English law, in all capital cases except treason, if the prisoner stood mute, and the jury to which the question was referred,[1] found that he did so from obstinacy or malice; or if he persisted in answering "foreign to the purpose;" he became liable to the "*peine forte et dure,*"[2] a barbarous mode of punishment and torture not finally done away by legislation till the reign of Geo. III. In other cases, (and in all cases of felony after the date of this legislation,) where the prisoner stood mute or refused to plead, the court proceeded—as if he had pleaded guilty—immediately to conviction and sentence;[3] and to the same effect appears to have been the practice of the earlier British courts-martial.[4] But, by a later statute of 7 & 8 Geo. IV, criminal courts, upon prisoners refusing to plead, were authorized to order a plea of not guilty to be entered; and in the present Rules of Procedure, (§ 35, A,) it is specifically directed that if the accused before a court-martial "refuses to plead, or does not plead intelligibly, a plea of not guilty shall be recorded on each charge."

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[1] See, as to this procedure, *post,* pp. 355–356.

[2] As to the description and history of this penalty, see 2 Hale, 319; 4 Black Com., 327–9; 1 Chitty, C. L., 426; Adye, 152; Tytler, 234; Delafons, 173; De Hart, 137.

[3] 1 Chitty, C. L., 425; 4 Black Com., 325; Rex *v.* Mercier, 1 Leach, 183; U. S. *v.* Hare, 2 Wheeler, C. C., 300; De Hart, 137–8.

[4] Simmons § 555. And see Tytler, 234–5.

In this country, it was specifically adjudged in a federal court in 1818 that the penalty of *peine forte et dure* was unknown to the laws of the United States.[1] Moreover a series of statutory provisions, dating from 1790, have—as the law is stated in Sec. 1032 of the Revised Statutes where they are now consolidated—enacted that—"*When any person indicted for any offence against the United States, whether capital or otherwise, upon his arraignment stands mute or refuses to plead or answer thereto, it shall be the duty of the court to enter the plea of not guilty on his behalf in the same manner as if he had pleaded not guilty thereto.*"[2]

At *military* law, the first enactment on the subject was that of Art. 70 of the code of 1806, and this has been repeated in Art. 89 of the present code, of 1874, as follows:—"*When a prisoner, arraigned before a general court-martial, from obstinacy and deliberate design, stands mute, or answers foreign to the purpose, the court may proceed to trial and judgment, as if the prisoner had pleaded not guilty.*"

Procedure. The application of the Article being restricted to cases where, from "obstinacy and deliberate design," the accused will not submit himself to be duly arraigned, it may become necessary for the court—where the accused stands mute, (or, what is equivalent,[3] refuses to plead,) or answers foreign to the purpose, and it is not clear that he does so from mere wilfulness—to satisfy itself by an investigation whether he acts from contumacy only or from some cause beyond his control.

In such a case, in the civil practice, a jury is ordinarily empannelled to try and determine whether the party is mute, &c.,

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[1] U. S. *v.* Hare, 2 Wheeler, C. C., 301.

[2] See U. S. *v.* Hare, *ante.* A similar statute exists "in probably all our States." 1 Bishop, C. P. § 733*a*.

[3] 2 Hawkins, c. 30, s. 1; 4 Black. Com., 324; Tytler, 233; O'Brien, 247; De Hart, 137. O'Brien, (p. 150,) includes also within the description of *standing mute* the case of an accused who, after a special plea interposed by him has been held inadmissible by the court, pertinaciously adheres to the same, refusing to plead to the merits. And see Benét, 108.

from malice or self-will, or *ex visitatione Dei*—that is to say, from a natural impediment or some other physical or mental infirmity. If the jury find that the silence, or refusal, results from the latter cause, the trial is, or not, proceeded with, according to the capacity of the prisoner to plead and defend with proper intelligence. If not found capable, he is remanded to custody for such disposition as the existing statute law may direct.[1]

In the military procedure, such an inquiry devolves of course upon the court, which, therefore, proceeds, with the assistance of such testimony, medical or other, as may, through the judge advocate, be made available, to determine the preliminary question.[2] If it find the accused to be apparently insane or idiotic, it suspends the proceedings, reporting the facts to the convening authority, for such action as he may think proper to take or to recommend to be taken by the Secretary of War—as, for example, a discharge from the service, or a committal to the Government Hospital for the Insane.[3] If again—a contingency which must be of still rarer occurrence in the Army—the accused be found to have lost, wholly or in part, the faculty of speech or hearing, he may, if sufficiently intelligent and able to communicate his thoughts and wishes, plead and defend through an interpreter, as in the civil practice: if not thus intelligent or capable, his case will properly be reported by the court to the convening officer, for discharge or other appropriate action. If, on the other hand, the court determine that the accused stands mute, &c., "from obstinacy and deliberate design," it will proceed as indicated in the Article; the accused himself remaining liable to a separate charge and trial (by a different court) for such offence as may, if his conduct has been aggravated, have been involved in his acts or words. If these indeed amount to a menace or a disorder disturbing the hearing, the court may be justified in proceeding as for a contempt under Art. 86.[1]

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[1] See 2 Hawkins, c. 30, s. 5; 4 Black. Com., 324; 2 Gabbett, 318; De Hart, 138; Rex *v.* Jones, 1 Leach, 102; Rex *v.* Mercier, Id., 183; Rex *v.* Steel, Id., 451; Rex *v.* Pritchard, 7 C. & P., 303; Rex *v.* Dyson, Id., 305; Rex *v.* Halton, Ry. & Mo., 78; Queen *v.* Goode, 7 Ad. & El., 536; Ley's Case, 1 Lew., 239; Thompson's Case, 2 Id., 137; Frith's Case, 22 How. S. T., 307; Com. *v.* Braley, 1 Mass., 102; Com. *v.* Moore, 9 Id., 402; Com. *v.* Hathaway, 13 Id., 299; Com. *v.* Hill, 14 Id., 207; Com. *v.* Tyree, 2 Va. Cas., 266; Matter of Turner, 5 Ohio, 544. And see, in this connection, Freeman *v.* People, 4 Denio, 9.

[2] On the subject of this inquiry by a court-martial, see Griffiths, 57; O'Brien, 248; Benét, 95.

[3] Under Sec. 4843, Rev. Sts.

It will be seldom, however, in practice that a court-martial will be required to proceed as enjoined in Art. 89; and but a few instances of such proceeding are to be found published in the General Orders.[2]

III. CONTINUANCE.

It is upon the arraignment and before the plea that application is, more frequently than later, made to the court for a continuance. The subject of continuances will therefore best be considered at this point.

Art. 93. This subject is now regulated by the 93d Article of war, which is as follows:—"*A court-martial shall, for reasonable cause, grant a continuance to either party, for such a time, and as often as may appear to be just:* Provided, *That if the prisoner be in close confinement, the trial shall not be delayed for a period longer than sixty days.*"

Construction and Effect of the Article, in general. This provision, which appears first as an Article of war in the revised code of 1874, was originally sec. 29 of the Act of March 3, 1863, ch. 75. Prior to this statute the only provision on the subject was that of a paragraph, (now numbered 1014,) of the Army Regulations, which directed that:—"Application for extended delay or postponement of trial will, when practicable, be made to the authority appointing the court. When made to the court, and if in the opinion of the court it is well founded, it will be referred to the convening authority to decide whether the court should be adjourned or dissolved." This regulation, which had in view applications to be made only or mainly by the accused, and to be made to, or finally passed upon by, the convening authority, was practically *superseded* by the statute, which authorizes either party, indifferently, to apply to the court for continuances, empowers the court alone to grant the same, and permits them to be granted at any stage of the proceedings. The Article in effect transfers to the court a function—similar to that exercised by the civil courts in continuing cases from one term or session to another[1]—which the regulation had devolved upon the convening officer. Applications to delay the trial, or rather the assembling of the court for the trial, made before the date designated in the Order for such assembling, must of course always be addressed to that officer; but such applications are of rare occurrence.

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[1] But a mere neglect to plead is not a contempt. Perrin *v.* Oliver, 1 Minn., 202.

[2] See cases in G. O. 96, Dept. of N. Mex., 1862; G. C. M. O. 62, Dept. of Va., 1865, where, upon the accused answering foreign to the purpose when arraigned, the court caused a plea of not guilty to be entered on the record, and proceeded with the trial. A more conspicuous case was that of C. L. Vallandigham, tried by military commission in 1863, who, denying the jurisdiction of the court, refused to plead to the charge; whereupon the plea of not guilty was entered as authorized by the Article. Printed Trial, p. 12; G. O. 68, Dept. of the Ohio, 1863. A recent marked case is that of Lieut. B. F. Handforth, published in G. C. M. O. 88 of 1887, where the accused stood mute as to the charge (under Art. 61) and all the three specifications. And see a later case in G. C, M. O. 28, Navy Dept., 1891.

The Article, by the words "shall grant," &c., is deemed to entitle the party to the continuance asked, (or to some continuance,) as a *right*, upon his showing "reasonable cause" therefor.[2] Thus the chief question under the Article is as to what constitutes reasonable cause. Before considering, however, the ground for continuance, we will notice certain minor points as follows:—

The Time for making the Application. The Article, in providing for the granting of continuances "as often as shall appear to be just," is deemed to authorize the making of applications or motions for the same *at any time pending the trial.*

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[1] The Article, however, though employing the more legal term "continuance," in lieu of the more colloquial "postponement" used in the regulation, does not employ it in the strict sense in which it is commonly used in the civil practice, but in a more general sense as including any temporary stay of proceedings, to be granted by the court at the instance of a party. See *post*—"Duration of the continuance," p. 359.

[2] See DIGEST, 109. A refusal by a court to grant a continuance, where reasonable cause therefor is exhibited, while it will not affect the legal validity of the proceedings, will, if the accused appears to have been thus prejudiced in his defence, or to have otherwise suffered injustice, "properly constitute good ground for disapproving the sentence, or for mitigating or partially remitting the punishment." DIGEST, 109. And see G. C. M. O. 35 of 1867; Do. 128 of 1876; G. O. 24, Dept. of Arizona, 1874; Do. 63, Dept. of Dakota, 1872; Do. 40, Fourth Mil. Dist., 1869.

But while sufficient causes for granting such applications may not unfrequently arise at later stages of the proceedings,[1] yet where the ground for a continuance exists and is known prior to or at the arraignment, the proper time for making the application is upon the arraignment and before the plea.[2] If the facts which would warrant the granting of the application are fully known at this time by the party, and he does not then present his motion but goes on to plead to the general issue, he may usually properly be held to have *waived* his title to a continuance based on such facts.

Both Parties equally entitled under the Article. The opinion has been expressed by some of the authorities, (writing prior to the enactment of the present Article,) that a continuance should be granted more readily to the accused than to the prosecution, in a case at least where the ground presented is the absence of a material witness.[3] The existing Article, however, avoids making any distinction between the parties, and the court should in general make none, whatever the ground of the application, but should look to the reason offered for the claim rather than to the source from which it proceeds.

Duration of the Continuance. The Article declares that a continuance shall be granted "for such time as may appear to be just," except in the single case where the accused is "in close confinement," (a term explained in a previous Chapter,[4]) when, it is provided, "the trial shall not be delayed for a period longer than sixty days." As the limit in the excepted case is thus broad, it may be inferred that it was contemplated that continuances might be allowed for very considerable periods, approximating in duration even to the continuances from term to term granted in the civil courts. In Capt. Howe's case,[5] the trial, for a reason hereafter to be noticed, was, at the instance of the accused, suspended for nearly two years. This indeed was exceptional, but in general it may be said that the period for which a continuance may legally be granted is without other limit than such as the exigencies and convenience of the service or the interests of justice may impose. In practice, a continuance for a longer period than a month is rare.

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[1] Simmons § 535; Kennedy, 66–7; Clode, M. L., 136; O'Brien, 246; De Hart, 129.

[2] See Kennedy, 66; De Hart, 129.

[3] See Simmons § 533; De Hart, 132; Benét, 87. The view expressed is founded upon a ruling on Col. Quentin's Trial, p. 35.

[4] Chapter IX—"ARREST."

[5] 6 Opins. At. Gen., 506.

Number of Continuances. The Article further authorizes the granting of continuances "as often as shall appear to be just." Continuances may thus be renewed, or new ones may be allowed, without any fixed limit as to number. A proper occasion for the renewal of a continuance would be presented where a material witness had not arrived at the time expected and to which the original postponement had extended, but there was reasonable ground to believe that he would arrive presently. So, where a continuance has already been granted for one cause, the court would be authorized to accede to a subsequent application based upon a new ground, provided the same could not have been anticipated at the time the former was presented, and is itself sufficient and properly evidenced.[1] But it is to be observed that, to sustain a new and especially a reiterated, application, a stricter measure of proof should ordinarily be required than in the case of the original motion: this indeed appears to be the view of the civil courts.[2]

It may be added that, under the wide discretion permitted it, to allow a stay of proceedings when and as often as it may deem just, a court-martial, like a civil court, may grant a continuance at the trial of *an issue formed upon a special plea* as well as at any other stage. But here too a stricter rule as to proof may in general properly be applied than where the trial is upon the general issue.[3]

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[1] See Moore *v.* McCulloch, 6 Mo., 448.

[2] "On a first application, a less degree of diligence would satisfy the court than on a second or third application." * * * * The court "would continue to require greater diligence on each successive application." Shook *v.* Thomas, 21 Ills., 89. And see 1 Bishop, C. P. § 951 *a*. Where a second application is made on the same ground as a previous one, it should be based upon new facts which have arisen since. Peru Coal Co. *v.* Merrick, 79 Ills., 112; Wilson *v.* State, 33 Ga., 207. A second application for continuance on account of an absent witness should show renewed diligence to secure his attendance used since the first continuance. Powers *v.* Lockwood, 9 Johns., 132; St. John *v.* Benedict, 12 Johns., 418.

[3] See Wade *v.* Birmingham, 2 Chitty, 5.

Grounds for Continuance. It was declared by Lord Mansfield in Rex *v.* D'Eon,[1] that—"no crime is so great, no proceedings so instantaneous, but that, *upon sufficient grounds*, the trial may be put off." A similar condition is expressed in our Article of war by the words "*for reasonable cause.*" Whether the cause stated in any case is a reasonable one, the court alone is empowered, in its discretion, to determine. But on this subject there are certain general rules which, though not absolute or imperative, have been recognized as properly guiding the discretion of the court; and these rules, which are in general also applicable to the military practice, will be referred to in considering the principal grounds for continuances—as follows:

1. Absence of a material witness. This is the most frequent of such grounds, both upon civil and military trials. In the case last above cited,[2] Chief Justice Mansfield clearly lays down the rules governing the granting of a continuance for this cause. "Three things," he observes, "are necessary to put off a trial—1. That the witness is really material and appears to the court so to be ; 2. That the party who applies has been guilty of no neglect ; 3. That the witness can be had at the time to which the trial is deferred." In our own law, it is directed by par. 1013 of the present Army Regulations, (par. 887 of 1861,) as follows : —"Upon application by the accused for postponement of trial because of the absence of a witness, it should distinctly appear on his oath—1st, that the witness is material, and why ; 2d, that the accused has used due diligence to procure his attendance ; 3d, that the accused has reasonable ground to believe, and does believe, that he will be able to procure such attendance within a reasonable time stated."

The affidavit or statement. This regulation is in terms confined to the case of an application by the accused. But the statute of 1863, (Art. 93,) enacted since the date of the original regulation, having provided for the granting of continuances to either party indifferently, the judge advocate, when the motion comes from him, may properly be called upon to make a similar statement, though his oath to the same need not be required. In practice the accused is generally sworn to his statement by the judge advocate. But—the regulation being directory only—the taking of the oath, and even the making of the formal statement, may be waived by the opposite party, and in practice is, with the consent of the court, not unfrequently dispensed with where the continuance asked is but for a brief period, and there is no reason to question the good faith of the party applying.[1]

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[1] 1 W. Black., 514.

[2] Rex *v.* D'Eon, 1 W. Black., 514; Id., 3 Bur., 1514.

But as a general rule, and especially where the continuance will entail an unusual delay, or is asked for at an unusual stage of the proceedings, the preferable course is for the party to present with his application the statement indicated in the regulation, setting forth explicitly therein the three points enumerated.

In the first place, therefore, he will properly state, not only that the witness is *material* but *how* he is material, and this by specifying as to what feature of the case he is to testify and what it is expected that his testimony will be in substance or effect.[2] And this testimony should appear to be substantial and appropriate to the issue of guilt or innocence under the specific charge, not testimony as to character merely,[3] or testimony which is only cumulative or reiterative as to a point already sufficiently exhibited in proof.[4] The main object, it may be noted, in specifying the facts proposed or expected to be proved by the witness is, not only that the court may better judge as to his materiality, but that the opposite party may have an opportunity to *admit* such facts or that the witness will so testify, and the occasion for a continuance thus be done away with. Where indeed, as is not rarely the case in a criminal proceeding, the personal appearance and statement of the witness will be of manifest and material advantage to the party applying for the continuance, he ought not in general to be deprived of the same by anything short of an unqualified admission and stipulation of record, by the opposite party, that the witness, if present, would testify as to certain facts, and that his testimony would be true.[1]

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[1] "While the court may refuse the application if the regulation be not followed, it may, in its discretion, refrain from insisting that the same be strictly complied with, and accept a modified form." DIGEST, 108.

[2] See Simmons § 533; O'Brien, 246. If the witness is material, it cannot affect the right to a continuance that his testimony is to be used in *rebuttal* only. G. O. 63, Dept. of Dakota, 1872.

[3] Wharton, C. P. & P. § 592; King *v.* Jones, 8 East, 34; People *v.* Wilson, 3 Park. 199; G. O. 28, Dept. of the Lakes, 1871. Where, however, the proposed testimony as to character is really important to the accused, and the judge advocate is not prepared to admit it, the court may properly grant a reasonable continuance.

[4] See People *v.* Thompson, 4 Cal., 238; Parker *v.* State, 55 Miss., 414; also Mull's Case, 8 Grat., 696; Rhea *v.* State, 10 Yerg., 258; DIGEST, 108. This general rule may also be departed from in a proper case.

Secondly, the party applying for the continuance should set forth in his affidavit or statement sufficient facts to show that he has used *due diligence* to secure the attendance of the witness—as that, without fault of his own, he has but just been advised of the existence or of the whereabouts of the witness; or "that he has endeavored without effect to serve on him a subpœna, specifying the exertions used;"[2] or that the witness has been duly served but refuses or neglects to appear and that an attachment has been or is about to be issued for him; or that he has been duly summoned, or ordered to attend, but residing, or being stationed or on duty, at a great distance from the station of the court, has not had time to reach the same;[3] or that he has been unavoidably detained *en route*, or that, having once attended in obedience to a summons or order, he has, without the fault or knowledge of the applicant, withdrawn or disappeared, and cannot be found, &c. And in every case, where the existence of the witness has been known, the party should state, not in general terms merely that due diligence has been used, but specifically what acts have been done by him and efforts made to procure his attendance.[4] Where the witness is absent on account of illness, the party should cause this fact to appear by a medical certificate or medical testimony, or, if such cannot be obtained, by some other reliable means of information.[5] From the facts exhibited the court will judge whether a reasonable diligence has been employed, or the party has been chargeable with laches: if the latter is apparent the application will regularly be denied.[1] And so will it be denied where there is reason for believing that the witness is absent by the procurement or connivance of the applicant himself.[2]

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[1] Compare Goodman *v.* State, 1 Meigs, 197; People *v.* Vermilyea, 7 Cow. 369.

[2] Wharton, C. P. & P., § 591.

[3] Or that he has been recently separated from his witnesses, by the change of station of his regiment or company. See case in DIGEST, 109 § 3.

[4] Wharton, C. P. & P. § 591; Pence *v.* Christman, 15 Ind., 257; Brady *v.* Malone, 4 Iowa, 146; People *v.* Thompson, 4 Cal., 438.

[5] Wharton, C. P. & P. § 591; 2 McArthur, 32; Simmons § 533; Maltby, 64; Macomb, 36; O'Brien, 246–7; De Hart, 131.

Thirdly, the party, in his affidavit or statement, should fix a date, not unreasonably distant, within which he should show, by facts specifically set forth, that he is reasonably justified in believing that he will be enabled to secure the presence of the witness at the court.[3] Where indeed, in the opinion of the court, it does not appear that the personal attendance of the witness may reasonably be expected to be secured within the time named, a continuance may still be granted for the purpose of enabling the party to obtain the *deposition* of the witness—the ground next to be noticed.

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[1] "It must be shown that the absence of the witness is not attributable to any neglect of the applicant." Simmons § 533. And see Kennedy, 67; Maltby, 64; O'Brien, 246. In Capt. Powlett's case, (2 McArthur, 28,) one of the reasons for which the court-martial refused a continuance to the accused was that he had not "taken the proper measures for preventing" witnesses, who had been at hand, from going abroad and thus absenting themselves at the time of the trial. Clode, (M. L., 136,) remarks: "A postponement to get up evidence, which ought to have been ready at the opening, would not be regular." In civil cases it is held not due diligence to rely on the mere *promise* of the witness to attend; and where this has been done by a party, he will not be allowed a continuance on account of the absence of the witness. Freeland *v.* Howell, Anthon, 198; Day *v.* Gelston, 22 Ills., 102; State *v.* Cross, 12 Iowa, 66; Mackubin *v.* Clarkson, 5 Minn., 247; Campbell *v.* Blanke, 13 Kans. 62; Hensley *v.* Lytle, 5 Texas. 500;—even where the witness has in fact been subpœnaed by the opposite party. Moore *v.* Goelitz, 27 Ills. 18.

[2] Wormley *v.* Com., 10 Grat., 658. On the other hand, a continuance will not be denied where the party, though apparently chargeable with laches, has really been prevented from securing the testimony by reason of the acts or omissions of the other party or his agents. U. S. *v.* Duane, J. B. Wallace, 10.

The accused in a military case cannot be charged with laches where the attendance of the witness has been prevented by superior authority,—as where the witness is detained on duty in the field or on other active service. See case in G. O. 63, Dept. of Dakota, 1872, noted in DIGEST, 109; also case referred to in Id., 109, § 3.

[3] Simmons § 533, Kennedy, 67; Macomb, 35-6; O'Brien, 246; De Hart, 130; DIGEST, 108. A "reasonable expectation" of procuring the testimony is a "standing requisite." U. S. *v.* Duane, J. B. Wallace, 8.

2. ***Time to procure the deposition of a distant witness.*** Where this is the ground for the continuance sought, the application should be presented as soon as practicable, and should satisfy the court that the testimony is material and that the witness, from physical causes or otherwise, cannot attend the court in person, or, by reason of the distance of his residence or station, the duty on which he is engaged, or other circumstance, cannot attend without undue expense or unreasonable delay, or serious prejudice to the service.[1]

The non-return of a deposition, for which interrogatories have been sent, may also constitute good ground for a brief continuance, where the moving party has not been chargeable with laches in having it executed or procuring its return.[2]

3. ***Absence of written or documentary evidence.*** The reasonableness of this as a ground for continuance is illustrated in an English case,[3] where, in granting a postponement to enable the defendant to procure a copy of a judgment of a distant tribunal, the court observe: "The absence of such a document is equivalent to the absence of a witness." In a military case, the occasion for moving for a continuance on this ground would most frequently arise where it was desired to obtain, for use in evidence, a certified copy, which could not be made and forwarded without some delay, of a record of trial, or other record or official document on file in the War or Treasury Department, or other public depository of the United States or a State. The court, before granting the motion, should be satisfied that the written evidence is material to the issue, that the party has not, by neglecting at a previous time to procure the original or a copy, forfeited his claim to the postponement sought, and that the writing can be procured without an unreasonable delay.

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[1] See Burris *v.* Wise, 2 Ark., 33; Waskern *v.* Diamond, Hempst., 702; Hawley *v.* Stirling, 2 Cal., 470.

[2] See Marsh *v.* Hulbert, 4 McLean, 364; Blagg *v.* Phœnix Ins. Co., 3 Washington, 5; Martin *v.* Anderson, 21 Ga., 301; Vaiden *v.* Abney, 7 La. An., 57; Hogan *v.* Burleson, 25 Texas, 35; Miles *v.* Danforth, 32 Ills., 59. In the last case the motion was granted, though it appeared that the commissioner had not yet met the witnesses; it being held that as the latter were volunteer soldiers in active service, the moving party was not chargeable with laches in not procuring the deposition to be promptly taken.

[3] Mackenzie *v.* Hudson, 1 Dow. & Ry., 159.

Where the record or paper is of a simple character, an admission by the opposite party as to its existence and contents may sometimes well be accepted as doing away with the occasion for a continuance.

Other grounds. Other recognized grounds for the granting of continuances are such as—the sickness of the accused as established by the proper medical evidence;[1] the temporary illness of the judge advocate;[2] the death, illness or absence of the counsel for the defence, in an important case, where considerable time is required to enable the accused to supply his place;[3] the serious indisposition (shown by medical testimony) of a material witness occurring pending his examination or when he is about to be called upon to testify.[4] So, a reasonable continuance may properly be granted the accused to enable him to procure counsel at the outset of the proceedings where he has not yet had a sufficient opportunity to do so.[5] It is also sometimes "reasonable cause" for a continuance that the accused, having been brought to trial presently upon his arrest or upon the service of the charges, has not had time to prepare his plea or defence;[6] or that a material amendment has been made in the charges or an additional charge has been introduced which he has not had sufficient time to examine or answer prior to the arraignment;[1] or that the case is one presenting grave questions of law or other unusual difficulties requiring extended study and preparation.[2] A further ground may be the pendency of other proceedings, in a similar or the same case, before another court-martial or a civil court; on account of which a continuance may properly be asked and granted, either because these proceedings will probably so illustrate and facilitate the investigation on the proposed trial as to make it desirable to suspend the same till such proceedings are terminated; or because a due respect for the civil authority requires that such suspension should be had. Thus in Capt. Howe's case,[3] the trial by court-martial was, (as above mentioned,) suspended for two years, (not indeed by a formal continuance, but upon the same principle,) for the reason that the accused had already been arrested, indicted, and held to bail by the civil authorities on account of the same act which formed the subject of the military charge, and for the purpose of awaiting the result of the criminal proceedings.

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[1] Wharton, C. P. & P. § 597; Simmons § 535; Kennedy, 45; Griffiths, 29; Clode, M. L., 136; Maltby, 64; Macomb, 36; O'Brien, 247; De Hart, 131. The fact of the illness may be presented by the judge advocate, the counsel for the accused, or the accused himself if able to come into court.

[2] See O'Brien, 247. In the event, however, of a merely temporary indisposition of the judge advocate or the accused, the court will ordinarily itself *adjourn* for a brief period, without any motion for a continuance being made. And where the illness seems likely to be protracted, the court may prefer to adjourn and report the fact to the Commander rather than to allow a continuance moved by a party. See *post*—"Continuance as distinguished from Adjournment," p. 368.

[3] "It would be contrary to natural justice that a party should be compelled to have his cause tried when the attorney who has all along had the management thereof is prevented by sickness from attending trial." Hayley *v.* Grant, Sayer, 63. And see R. I. *v.* Mass., 11 Peters, 229; Schultz *v.* Moore, 1 McLean, 334; Hunter *v.* Fairfax, 3 Dallas, 305; Hill *v.* Clark, 51 Ga., 122; Rossett *v.* Gardner, 3 W. Va., 531; Marrero *v.* Nunez, 3 La. An., 54.

[4] Simmons § 533.

[5] Simmons § 475, 536. DIGEST, 110; G. C. M. O. 25 of 1875. So, it may be proper to accord a brief continuance to a party desiring to procure an interpreter, clerk, or stenographer, where the necessity or expediency of employing such assistance is sufficiently made to appear.

[6] Kilmarnock's Case, Foster, 2; State *v.* Lewis, 1 Bay, 1.

Trial of the Issue on an Application for Continuance. Upon an application for a continuance under the Article, all facts and circumstances relied upon by the party to sustain his motion should properly be laid before the court; and, where desirable, he may fortify his statement or affidavit by the statements and affidavits of other persons.[1] He may annex to, or incorporate or present with his own statement such orders, communications, or other written evidence as may be apposite. To support his motion, he may also introduce witnesses, (to be sworn by the judge advocate ;) and the opposite party, if he *contests* the application, may offer counter affidavits and rebutting witnesses; and both parties may make argument.[2] For in such a case a regular and legal *issue* is joined, and, (although the proceedings, being preliminary merely, should be as brief as practicable,) an issue to be duly tried and determined. But where the *accused* applies for a continuance upon a recognized ground, and furnishes a satisfactory statement or sufficient evidence to warrant it, his application, except perhaps as to the extent of time asked for, will not often be contested by the judge advocate.

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[1] Hough, 31; Id., (P.) 667; Simmons § 418; Griffiths, 62; O'Brien, 250; DIGEST, 109. A further ground may consist in the fact that a material amendment is allowed by the court to be made in the charges after arraignment or pending the trial. DIGEST, 109, 235. Important unexpected testimony given on the trial, which could not reasonably have been anticipated, may also furnish ground for a continuance. DIGEST, 751.

[2] And so where, from some unforeseen accident or casualty, the party has been deprived of the opportunity to prepare for trial. See Torrey *v.* Morehouse, 1 Johns. Cas., 242; Nixen *v.* Hallett, 2 Id., 218; Farr *v.* McDowell, 1 Bay, 31.

[3] 6 Opins. At. Gen., 506. To the grounds here enumerated may be added one other, recognized in the civil practice and which may under some circumstances be applicable to a military case, viz: the prevalence of a state of public excitement and prejudice precluding for the time an impartial trial. See Rex *v.* Gray, 1 Bur. 510; Com. *v.* Dunham, Thach., 516; Jim *v.* State, 15 Ga., 535; Nelson *v.* State, 2 Swan, 483.

It may be added that, in general, the facts set forth in an affidavit for a continuance, if frankly and fully stated, are to be taken to be *prima facie* true, and, if not disputed by the opposite party, are to be acted upon as substantially true by the court.[3]

Continuance as distinguished from Adjournment. In conclusion may be noticed the distinction between *continuances*, which are granted to a party upon his application therefor under the authority of the Article of war, and *adjournments*, which are properly brief intermissions of its business taken by the court itself of its own accord or as its own act. An adjournment may sometimes accomplish the purpose of a continuance and render one unnecessary. Thus, for some such object, not likely to involve a long delay, as to enable the accused to procure counsel, or the judge advocate a clerk; to secure the presence of a witness who is *en route* and expected presently; to give time for the recovery of a party, counsel, witness, or member, who is temporarily ill, &c.—a voluntary adjournment by the court for a day, or for a few days, or from day to day for a brief period, will often be adequate without a resort to an application for the formal continuance contemplated by the Article. Even a *recess* taken by the court for a part of a day will sometimes be sufficient.

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[1] See King *v.* Siberil, 1 Ken., 356; Maltby, 64.

[2] See Simmons § 533. But see DIGEST, 108, note.

[3] See Wick *v.* Weber, 64 Ills., 167; Quincy Whig Co. *v.* Tillson, 67 Id., 351.

Extent of authority to adjourn. An adjournment is not to be resorted to merely for the convenience of the members.[1] It should be taken to some particular day; to adjourn subject to the call of the president would be irregular; to adjourn subject to the call of the judge advocate would be quite without the sanction of military usage.[2] In war, or when otherwise specially prompt action is required, the court may adjourn to the quarters of a sick member and there hold a session,[3] or to the quarters of a sick witness for the purpose of taking his testimony.[4] In a case of necessity a court-martial may even adjourn to a different station or locality, but such an adjournment should, regularly, be specially authorized or subsequently ratified by the Commander. An adjournment *sine die* or "without day" has no legal significance, and no more effect than a simple adjournment; a court-martial being a creature of orders and having, as has heretofore been noticed,[5] no power to dissolve itself or terminate its own existence.[6]

IV. NOLLE PROSEQUI OR WITHDRAWAL.

Definition. At or before the arraignment, (or later pending the trial,) it may happen that it will be expedient for the government to enter a *nolle prosequi* as to the charge, or, where there are several charges, to one or more of the charges or specifications. The term is derived from the common law formula according to which the prosecutor comes into court and *fatetur se ulterius nolle prosequi.* It is thus a declaration of record on the part of the prosecution that it withdraws the charge or specification from the investigation and will not pursue the same further at the present trial.

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[1] "While courts have the unquestioned right to adjourn from time to time in the interests of the public service, and while they are the judges of what the public service may require, yet an adjournment prompted by the caprice, or made to suit the convenience of the members or a part of them, involves the offence of disobedience of orders on the part of those members who vote for it." G. C. M. O. 161, Dept. of Dakota, 1882. (Gen. Terry.)

[2] "The future meetings of the court should not have been left to the discretion of the judge advocate." G. C. M. O. 9, Dept. of Texas, 1883. (Gen. Augur.)

[3] Hough, (P.) 712, 721.

[4] Hough, (P.) 744; Kennedy, 45; DIGEST, 146. And note instance in G. C. M. O. 37, Dept. of the East, 1870.

[5] Chapter V.

[6] DIGEST, 145; G. C. M. O. 142, Dept. of the Mo., 1870.

Authority and occasion for. It is a prerogative of The State that it may always withdraw in whole or in part a prosecution. As it has already been indicated, a *court-martial* has no authority *of its own motion* to withdraw a charge, nor has a *judge advocate*, in his capacity of prosecuting officer or otherwise, any such authority.[1] The authority to *nol. pros.* must be exercised by the superior who, as the representative of the United States,[2] ordered the court, or must be obtained from him. The principal grounds for this proceeding, when duly authorized, will be—the fact that the charge, &c., is discovered to be substantially defective and insufficient in law; that it is ascertained, (which indeed may not be done till the trial is quite or nearly concluded,) that the allegations cannot be proved, or that the testimony available is not sufficient to sustain them; that the criminality of one of the accused, where there are several, cannot be established; that it is proposed to use one of the accused as a witness, &c.[3] As will be noticed in the next Chapter, this proceeding is the proper one, where a valid plea of pardon is interposed by the accused. The entry of a *nolle prosequi* is sometimes also resorted to in anticipation of a motion to quash, or after such a motion has been made and because of it.[4]

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[1] See ante, p. 284, and notes.

[2] "There can be no doubt of the power of the President to order a *nolle prosequi* in any stage of a criminal proceeding in the name of the United States." Atty. Gen. Wirt, in 5 Opins., 729. And see U. S. *v.* Corrie, Brunner, 686.

[3] In G. O. 64, Dept. of the Cumberland, 1867, it was properly held to be "no ground for a *nol. pros.*," that to proceed with the trial would prejudice the interests of the service in detaining the accused, and an officer present as a witness, from important duties. In G. O. 75, Dept. of the South, 1870, where the judge advocate, with the assent of the court, entered a *nol. pros.* to certain charges and specifications, on the ground that three of the most material witness had absented themselves without authority from the court-room and could not be found, and the remaining witnesses could not prove the case, this action was disapproved by Gen. Terry, and it was remarked that—"the reason assigned, unless the court was satisfied that every proper effort had been made to procure such evidence, ought to have been considered by the court as insufficient."

[4] See State *v.* Buchanan, 1 Ire., 59, where a motion having been made to quash, the prosecuting attorney *nol. prossed* as to a defective count, retaining the rest of the indictment. As to the Motion to quash or strike out, see Chapter XVI.

Effect. A withdrawal of a charge or specification is not *per se* equivalent to an acquittal, or to a grant of pardon, and cannot be so pleaded. It simply removes from the pending case the particular charge, &c., without prejudice to its being subsequently renewed in its original or a revised form. In the criminal procedure, indeed, a *nolle prosequi* cannot in general be entered, after arraignment and plea, without the consent of the accused, who, in the view of the law, is deemed, in the event of such action, to be entitled to a verdict which he may plead in bar of a second trial; so that, if the entry is made against his consent, it is held to be tantamount to an acquittal.[1] But this doctrine cannot properly be applied to cases before courts-martial, where the proceedings are conducted under military orders, and where, when charges are withdrawn from prosecution, they are so withdrawn by the order, (or, what is equivalent, the sanction,) of the official superior who created the court and directed the trial—an order which binds the judge advocate, the accused and the court alike.

Practice. In the military practice, the *nolle prosequi* has mostly been resorted to at the outset of a trial and especially where a special plea or motion to strike out has been allowed by the court. The objectionable charge or specification being thus formally withdrawn, the trial proceeds on the other charges and specifications. If, at a *later* stage of the trial, it is found that a charge or specification cannot be sustained, or it is determined for other reason that the same shall not be pursued, while it will be legal to enter a *nol. pros.* thereto, it will be the preferable course, as well as most just to the accused, not to do so, but to allow the accused to be formally *acquitted* thereon at the finding.[2]

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[1] See 1 Bishop, C. P. § 1394; Wharton, C. P. & P. § 447; U. S. *v.* Shoemaker, 2 McLean, 114; U. S. *v.* Farring, 4 Cranch C., 465; Com. *v.* Tuck, 20 Pick., 366; Com. *v.* Scott, 121 Mass., 33; Mount *v.* State, 14 Ohio, 301; Reynolds *v.* State, 3 Kelly, 53.

[2] See G. O. 64, Dept. of the Cumberland, 1867; G. C. M. O. 79, Dept. of the Platte, 1877; Do. 6, Dept. of Cal., 1872.

CHAPTER XVI.

PLEAS AND MOTIONS.

Answer to the Arraignment. The accused, upon being arraigned, may, (where he does not stand mute, or ask a continuance before pleading,) answer to the arraignment in several forms. He may proceed at once to plead "guilty" or "not guilty" to the charge and specifications, (or "guilty" to some and "not guilty" to others;) or he may interpose, by way of special plea or motion, an objection or objections to his being tried at all; or he may similarly object to being tried on some particular charge or charges, specification or specifications, while pleading the general issue as to the rest. He is not indeed limited to one special plea or motion, but may offer such number as the law or facts may justify, before—in the event of their disallowance—resorting, as he may then do, to the plea of "guilty" or "not guilty."[1]

Preliminary Objections. We have already seen that at an earlier stage, *viz.* prior to the swearing of the court, and at the point at which challenges are usually offered, the accused, being present, may raise any objection properly going to the legal existence of the court,—as that it has not been legally constituted or composed; or to its authority to proceed with the trial,—as that it is without jurisdiction of the person or the offence. Such objections are indeed good at any time; they may therefore be taken at the stage now reached, *viz.* upon the arraignment. The objection, however, that the court is an illegal body, whose proceedings must be void *ab initio*, is a radical defect which is most appropriately raised and determined at the earliest stage, and the grounds for such objection, have already been considered in the Chapters on the Constitution and Composition of General Courts-Martial. The plea of want of jurisdiction, on the other hand, being based mainly upon the descriptions and averments of the charges, which are not formally before the court till the arraignment, may properly be, and in practice generally is, reserved till this time.

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[1] See 4 Black. Com., 338; Tytler, 242; Maltby, 60; O'Brien, 250.

Division of the Subject. The subject, therefore, of the *answer to the arraignment* may be presented under the following heads, indicating the different forms in which such answer may most fitly be made:—I. Plea to the Jurisdiction; II. Motion to quash or strike out; III. Special pleas in bar; IV. Plea of Guilty or Not Guilty.

I. PLEA TO THE JURISDICTION.

Its Effect. That this plea, (which is to the effect either that the person of the accused, or the offence charged, is not within the jurisdiction of the court,) is one which may legally be made and entertained, is now fully settled in our military law and practice. In other words, a court-martial is authorized to pass upon the question of its own authority to proceed to *try* under the convening order.[1] Its conclusion indeed upon such question is in the nature of a recommendation and not final; and if, having determined that it has not jurisdiction, it is thereupon *ordered* by the convening officer to take cognizance of the case, it will be its duty to comply. As we have already seen, a court-martial is a creature of orders, and, except as to the exercise of an authority specifically devolved by statute, is subject to the orders of the proper superior equally as is any officer or body of officers in the army.[2]

The Subject Elsewhere Considered. The subject of this plea, however, need not here be dwelt upon. In Chapter VIII, under the title of the Jurisdiction of General Courts-Martial, have already been fully exhibited the occasions and grounds for such plea in general, and in Chapter XXII are indicated the special grounds upon which the same may be offered upon a trial before an Inferior Court. The situations and circumstances therefore which justify this plea need not here be reiterated.

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[1] See Tytler, 143; 5 Opins. At. Gen., 707.

[2] Chapter V, *ante*.

II. MOTION TO QUASH OR STRIKE OUT.

Its Nature and Scope. By means of this convenient and effective motion on the part of the accused,[1] may be raised and decided in a summary manner all the objections which in the civil practice may be taken by the plea to the jurisdiction, the demurrer, the plea in abatement, or the motion in arrest of judgment. It is in effect a species of informal and commonly oral plea,[2] much availed of in the criminal courts, as a ready and effectual means of disposing of objections in general to the indictment, by effacing the same, or a separate count, from the record. As remarked in an adjudged case,[3] the motion to quash, as compared with the other forms of procedure above mentioned, "is a more easy and equally effectual mode of getting at the whole matter: everything may be heard upon it." This motion, though it has not received from military writers[4] the attention to which it is entitled, is not unfrequently resorted to in the modern military practice, where it is commonly distinguished as the *motion to strike out.* In this practice, in which the demurrer as such is not appropriate, and the plea in abatement, being dilatory and captious in its character, is rarely employed, and in which also the motion in arrest of judgment is unknown, the motion under consideration, from its simplicity, directness, and efficiency, is deemed to have a peculiar aptness and value.

Form of the Motion. There is no prescribed form for this motion, which may either be oral or in writing.[5] It should not, however, be made in general terms, but its precise ground or grounds should be distinctly specified.[1] Otherwise indeed the court may decline to entertain it.

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[1] It may also be made by the *prosecution* with regard to a *special plea* interposed by the accused, claimed to be insufficient in form or substance.

[2] See 1 Bishop, C. P., § 761.

[3] Nichols *v.* State, 2 Halst., 539. And see State *v.* Wishon, 15 Mo., 503; State *v.* Dayton, 3 Zabr., 49.

[4] Simmons indeed, (§ 568,) remarks in substance that the accused may offer, by way of *plea*, an objection to the charge on account of a want of specific allegation as to some material matter. And see, (as repeating him,) Macomb, 37; De Hart, 145–6; O'Brien, 249. It may be observed that there is no subject in regard to which military writers in general are more incomplete and uninstructive than that of Pleas and Motions; the matter of pleas proper being repeatedly found confused on the one hand with that of motions, and on the other hand with that of defences.

[5] In practice, it is commonly oral. See *ante.*

At what stage to be Interposed. As has already been indicated, this motion is one to be made upon the arraignment and before a plea to the general issue. But as its effect, if granted, is to save time and simplify the proceedings, a criminal court will always permit an accused, who has pleaded not guilty, to withdraw his plea for the purpose of interposing this motion,[2] and a court-martial will properly do the same.

Occasion and Use of the Motion. "Whenever," writes Bishop,[3] "an indictment cannot be proceeded with advantageously to public justice, or without doing a wrong to the defendant," it may, on proper motion, be quashed. As in the ordinary criminal procedure, so in that of courts-martial, this motion may and properly will in general be made, with regard to a charge or specification, on one, (or more,) of the grounds following, *viz*:—that the person described or offence charged is not within the jurisdiction of the court, (though this point is more commonly taken by way of a special plea to the jurisdiction;) that the charge does not set forth facts sufficient to constitute the alleged offence; or that, for a non-observance in the pleading of the rule of certainty or some other or others of the rules heretofore laid down as governing the framing of charges, the accused is actually prevented from making a proper plea or defence. As in the civil practice, the ground of the motion most frequently relied upon will be that the charge or specification does not set forth the intended offence, or any legal offence; this motion being really, in its commonest application, a substitute for the demurrer.[4] The motion, however, is not unfrequently made on account of the serious indefiniteness of the substance of a specification.[5]

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[1] See State *v.* Maurier, 7 Iowa, 408.

[2] Nichols *v.* State, 2 Halst., 539.

[3] 1 C. P., § 758.

[4] See State *v.* Robinson, 9 Foster, 274; Thomasson *v.* State, 22 Ga., 499; Com. *v.* Chapman, 11 Cush., 422.

[5] Compare State *v.* Rutherford, 13 Texas, 24, where a count was quashed on motion because—"so vague, uncertain, and indefinite that

Addressed to the Discretion of the Court. This motion being of a summary and aggressive character, in the nature of a raid upon the indictment, it is agreed by the authorities that it is in all cases wholly *within the discretion of the court* whether or not it will allow a proceeding the effect of which is to eliminate the entire basis and material of the prosecution or an important part of it.[1] While in a clear case the motion will generally be granted, in a case of any doubt the court will commonly prefer not to accede to so abrupt a method, but to leave the accused to take advantage of the alleged defect on the general issue.[2] A court-martial will also the more hesitate where the charge moved to be struck out has been preferred or revised by high military authority, and there is thus an unusually strong presumption in favor of its completeness and sufficiency in law. The test which the civil courts usually apply to an indictment or count moved to be quashed is the question whether it will support a legal judgment: if it will, the motion is not granted.[3] With a court-martial the corresponding test would be whether a finding of guilty upon the charge or specification which is the subject of the motion would convict the accused of a legal offence for which sentence could properly be adjudged, or of one the trial of which could be

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he (the accused) is unable to understand what he is called upon to defend." And to a similar effect, see Rex *v.* Heffer, 1 Ry. & M., 210.

Indefiniteness of averment as to *time* and *place* in a specification may properly furnish ground for this motion. See instance in G. C. M. O. 78, Dept. of Dakota, 1892. In sustaining the motion, the court should require an amendment if practicable. G. C. M. O. 16, Dept. of the Mo., 1890.

It may be added here that where there are in the case two charges against the accused in substantially the same form and for the same offence, whereby, without material advantage accruing to the prosecution, the defence must be embarrassed, a motion to strike out one of them may properly be made and allowed. Compare State *v.* Tisdale, 2 Dev. & Bat., 160.

[1] Nothing is better settled than that the court is not *bound* to quash an indictment before trial. State *v.* Burke, 38 Maine, 574. "It is a matter of discretion whether an indictment shall be quashed in any case; it is not *ex debito justitiæ*. In an important and doubtful case I would not do it." Hornblower, C. J., in State *v.* Hageman, 1 Green, 323.

[2] See 1 Bishop, C. P., § 768.

[3] Hawkins, c. 25, s. 146; State *v.* Dayton, 3 Zabr., 49; State *v.* Baldwin, 1 Dev. & Bat., 195; Com. *v.* Eastman, 1 Cush., 189; U. S. *v.* Pond, 2 Curtis, 265.

pleaded in bar of a second trial for the same offence.[1] The granting of the motion being discretionary with the court, a refusal to allow it cannot affect the legality of the proceedings.[2]

Not in General to be Granted except for a Defect of Substance. Although motions to quash have been allowed in the civil practice for "gross deficiency in the formal requisites,"[3] the better general rule is that to warrant the granting of the motion the defect must be of a substantial character and not one of form merely.[4] So, in a military case, the court will properly disallow a motion to strike out a specification on account of a mere defect of form, (except where of an unusually aggravated character,) or even for a slight substantial defect where it can be at once or presently remedied by an amendment on the part of the judge advocate.

Admission of Evidence in Support of the Motion. This being a summary proceeding, it is the general rule that it must be based upon a defect appearing on the face of the pleading. This rule, however, is held not to preclude the court from aiding its discretion by taking into consideration extrinsic facts admitted by the prosecution or exhibited in evidence by affidavit.[5] In military proceedings there can in general be no objection to thus showing some fact of a simple character essential to fully sustain the motion and which will enable the court at once to determine it. But facts which are in issue between the parties cannot be shown in this connection, and if proof of such facts is necessary to sustain the motion, the same will properly be denied, and the accused be left to his defence.

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[1] Thus a motion to strike out a charge of "conduct unbecoming an officer or a gentleman," or other specific charge, should not be granted where the specification will at least support a valid finding of "conduct to the prejudice of good order and military discipline."

[2] State *v.* Putnam, 38 Me., 297; Com. *v.* Eastman, 1 Cush., 189.

[3] 1 Chitty. C. L., 302. And see U. S. *v.* Crittenden, Hemphill, 61.

[4] State *v.* Dayton, 3 Zabr., 53; Bell *v.* Com., 8 Grat., 603. The statutes of some of the States contain express provisions to the effect that indictments shall not be quashed for defects not prejudicing the substantial rights of the defendant upon the merits. See, for example, the Indiana statute referred to in Dukes *v.* State, 11 Ind., 560.

[5] See 1 Bishop, C. P. § 763.

Proceeding upon the Granting of the Motion. The court, instead of allowing the motion in terms, may, as already indicated, permit the judge advocate, if he desires it, to amend the defective pleading, provided an adequate amendment can at the time be made. But if the motion is specifically granted, and it relates to the only charge or all the charges in the case, the court will communicate, through its president, to the convening authority, the action taken, and await his orders; meanwhile, if thought desirable, proceeding with any other case that may be ready for trial. If the motion as granted has related to but one or a portion of two or more charges or specifications, the court will proceed with those left unassailed precisely as if they were the only charges originally in the case; their validity not being affected by the striking out of the other or others.[1] If, however, the remaining charges or specifications be of a comparatively unimportant character, the court may in its discretion communicate with the convening authority before proceeding to try the same.

The commander, on receiving the report of the court, may, if he disapproves its action, order it positively to proceed to try the charges,[2] or require it to reconsider such action in the same manner as upon a final judgment. Or, whether disapproving or concurring, he may direct the court to proceed with the trial upon the remaining charges or specifications; or, if all the charges, &c., be eliminated, or those left be such as not to make it worth while to pursue them alone, he may direct the judge advocate to abandon the prosecution altogether. Or he may transmit to the court new or amended charges, to be tried with those of the former set which remain, or, where none remain, to form the basis of a new prosecution.[3] In either of these cases, whether the charges be altogether new or amended, the proceedings should be commenced *de novo;* the accused being again offered the opportunity of challenge, and the court being resworn.[1]

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[1] State *v.* Woodward, 21 Mo., 266; Simmons § 568. But quashing an indictment as to one of several *joint* defendants, and upon his motion, quashes it as to all. 5 Bac. Abr., 96; People *v.* Eckford, 7 Cow., 535.

[2] As to the exercise of this power, see "*Procedure on Special Plea, in general,*" *post.*

[3] In the same manner as, after an indictment has been quashed, "a new and more regular one may be preferred." 1 Chitty, C. L., 304.

III. SPECIAL PLEAS IN BAR.

Under this Title will be considered, as special pleas in bar of trial in military cases—The Plea of the Statute of Limitations; The Plea of Former Trial for the same offence; and the Plea of Pardon. To these will be added a reference to certain Inadmissible Special Pleas.

THE PLEA OF THE STATUTE OF LIMITATIONS.

As pointed out in Chapter VIII, the objection, in a military case, that the statutory limitation of prosecution has taken effect, is, by the present weight of authority, not one going to the jurisdiction of the court, but *matter of defence* only. As such, while it may be taken advantage of upon the general issue,[2] it is preferably disposed of at the outset of the proceedings by the special plea now to be considered.[3]

The Statute. The military statute of limitations consists of the 103d Article of War, which embraces all offences and dates from the code of 1806, and an amendatory Act, relating to the offence of *desertion* alone, of April 11, 1890. The original Article is as follows—"*No person shall be liable to be tried and punished by a general court-martial for any offense which appears to have been committed more than two years before the issuing of the order for such trial, unless, by reason of having absented himself, or of some other manifest impediment, he shall not have been amenable to justice within that period.*" And the following is the amendment—"*No person shall be tried or punished by a court-martial for desertion in time of peace and not in the face of an enemy, committed more than two years before the arraignment of such person for such offense, unless he shall meanwhile have absented himself from the United States, in which case the time of his absence shall be excluded in computing the period of the limitation: Provided, That said limitation shall not begin until the end of the term for which said person was mustered into the service.*" The effect of the two enactments is that, whenever an accused is brought to trial for an offence committed more than two years before the date of the order convening the court—or, in a case of desertion in time of peace, more than two years after the end of his term of enlistment—he may specially plead that the statutory limitation has taken effect and he is not amenable to trial, and that, if the fact appears to be as pleaded, the prosecution shall cease.[1]

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[1] *Motion to sever.* Here may be noticed a motion which will regularly be made at the arraignment, *viz.* the motion by one of two or more *joint* accused to be allowed to "sever," *i. e.* to be tried separately from the other or others. Except where the essence of the charge is combination between the parties, (as in mutiny,) the motion may properly be granted for good cause shown. (See Manual, 496; Pratt, 68; English Rules of Procedure, 15.) The more common grounds of motions for severance are that the mover desires to avail himself on his trial of the testimony of one or more of his co-accused, or of the testimony of the wife of one, or that the defences of the other accused are antagonistic to his own, or that the evidence as to them will in some manner prejudice his defence. This motion has most rarely been presented to the court in our military practice. It was made by several of the accused on the trial by military commission of Milligan, Bowles, and others, in Indiana, in 1864, and by McRae, on the trial, by a similar tribunal, of McRae, Tolar and others, in North Carolina, in 1867, but in each case was overruled. Where the *prosecution* desires to use one of two or more joint accused as a witness against another or others, the practice is not to move to sever but to enter a *nol. pros.* as to such one.

[2] 1 Bishop, C. P. § 799; Wharton, C. P. & P. § 317.

[3] Statutes of limitation are "available as a defence," only "when they are at the proper time specially pleaded." Gormley *v.* Bunyan, 138 U. S., 623, 635.

Prior to the enactment of 1890, the question was actively disputed whether the 103d Article applied to prosecutions for desertion; the conclusion of the Judge Advocate General and Attorney General[2] that it did so apply, though sustained by the courts,[3] not being adopted by the Secretary of War.[1] The amendment might possibly be viewed as still leaving the question open as regards desertion in time of war. But upon a fair construction of the two statutes taken together, in connection with the judicial rulings referred to, the only reasonable interpretation that can be adopted is that the term "any offence" in the Article properly includes any form of desertion not specifically provided for in the amendment.

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[1] See a recent case in G. C. M. O. 73 of 1892, where a plea of the limitation, interposed by an alleged deserter, was properly sustained by the court—no evidence of any absence from the jurisdiction being, apparently, available on the part of the prosecution.

[2] See the previous edition of this work, vol. 1, p. 353.

[3] In Davison's case, in 1880, (*In re* Davison, 4 Fed., 507,) Choate J. clearly and ably expresses himself on this point as follows—"It is insisted on the part of the respondent that by 'absence' is here meant absence from the post of duty, and that this article has no application to desertions. It is certainly a startling proposition that there is no limitation at all upon prosecutions for the offence of desertion; that one who has once been a deserter is subject during the whole of his natural life to be brought before a military court and

Beginning and End of the Period of Limitation. I. The point at and from which the limitation is to *begin to run* is seen to be not the same in the two enactments. In the original Article, as in most criminal statutes of limitation, the point fixed is the date of the commission of the offence. In the body of the amendment of 1890 the same date is indicated to be observed, but this indication is materially qualified by the subsequent inconsistent proviso that "said limitation shall not begin until the end of the term for which said person was mustered into the service"—a carelessly drawn provision, as shown by the use of the term "mustered" instead of *enlisted*. This condition, engrafted upon our code from the German military system,[2] was designed of course to extend the period for the prosecution of deserters, but it is quite unequal in its operation. Thus a soldier deserting a short time prior to the expiration of his term of enlistment must be prosecuted, if at all, within about two years; while one deserting presently after his entering upon his enlistment, (which, under existing law, must be for five years,[3]) need not be prosecuted till at the end of nearly seven years. Thus the longer a soldier re-

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tried and punished for this offence, even in extreme old age. Yet this is seriously contended by the learned counsel for the respondent. The statute does not require, nor in my opinion admit of so strict and narrow a construction. There is nothing in this article itself clearly indicating that it does not extend to every military offence. As it is the only article limiting the time of prosecutions the presumption is very strong that it extends to every military offence; for, with the single exception of the crime of murder, the almost universal policy of the criminal law is to prescribe a term within which the offender shall be brought to trial." And see Same Case in 21 Fed., 618; *In re* White, 9 Sawyer, 49; *In re* Zimmerman, 30 Fed., 178.

[1] See opinion of Secretary Cameron, cited in the previous edition, vol. 1, p. 354–5. This is pronounced by Sawyer J., in *In re* Zimmerman, *ante*, as "a manifestly unjustifiable ruling."

[2] See 15 Opins. At. Gen., 159.

[3] [Now fixed at *three* years, by the Act of August 1, 1894.]

mains in the service, with the more chance of impunity may he desert it. It is believed that this discrimination is not founded on good reason, but that the term of limitation should be the same in all cases. It is in general of doubtful expediency to introduce into the American military practice a rule derived from a foreign code, and especially where such rule is based upon a theory not tenable in our law. The theory upon which this rule is founded is that desertion is a "continuing offence," *i. e.* is an offence which, when once committed on a certain day, continues to be committed anew on every successive remaining day of the term of enlistment of the soldier, so that, being committed on the last day of the term equally as upon the original day, the limitation should not begin to run till after such last day. But this refinement is not deemed to be applicable to desertion in our law. A "continuing offence," as the maintaining of a nuisance, is one which *per se*, and without regard to the intent, if any, of the offender, works injury to individuals or the public so long as it is not abated, and is thus viewed as committed indifferently on every and any day of its maintenance. But desertion consists in an offence of which the gist is a particular intent and one which must be entertained at a particular time, viz. at the moment of the unauthorized departure. Thus, in the view of the author, a desertion is, as a legal offence, committed but once, being complete and consummate on the day on which the soldier quits the service with the *animus non revertendi;* the "continuing offence" thereafter committed being *not* the desertion but the simple minor offence of *absence without leave involved in it*, and which of course continues till the deserter's apprehension or voluntary return.[1]

It is believed that the most practical and the preferable rule of limitation in military cases that could be adopted would be to prescribe that the period of the limitation should commence in all cases with the day of the date of the offence as consummated and run from that date a certain term, say two years, in the cases of all offences except desertion, and a somewhat longer term, say three years, in cases of desertion.

II. The point at which the period of limitation is to terminate, or from which such period is to be reckoned back, is also, it has been perceived, quite different in the two statutes which make up our military law of limitation; it being in the Article the date of "the issuing of the order" for the trial, *i. e.* the order convening the court, and in the Act of 1890 the date of "the arraignment" of the accused. The former provision is subject to the criticism that it allows of an indefinite interval between the date of the order and that of a trial had thereunder, without the right of the government to prosecute being affected.[1] This consequence, however, is one which has not often ensued and is not likely to ensue in practice, especially in view of the directions, designed to secure prompt trials, of Arts. 70 and 71. The latter provision is objectionable in that an accused in whose case the period of the limitation was nearly expired, could, by postponing for a short time—as by an illness real or pretended—his being arraigned, escape a prosecution. Such objection might indeed generally be avoided by specially authorizing the court to convene at the hospital or at the quarters of the sick man for the purpose of the arraignment, adjourning thereupon till he should be well enough to go to trial. The general rule of limitation in the British military law[2] is that no person shall be tried for an offence committed "more than three years before the date at which his trial begins;" the day or occasion on which the trial is to be considered as beginning not however being indicated. The rule prescribed by the U. S. Revised Statutes, for offences triable by the federal courts, is that the indictment shall be found within a certain number of years after the commission of the offence. In the military procedure the service of the charges upon the accused would best correspond with the finding of the criminal indictment. It is certainly desirable that a point of time should be fixed by law as that from which, uniformly in all cases, the limitation is to be reckoned back or at which it is to cease to run; and that fixed by the original 103d Article, being familiar to the service as having been the legal limit since 1806, may, though not free from objection, well be considered as upon the whole the preferable one.

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[1] See the first edition of this work, (1886,) pp. 355–358.

Excepted Cases—Absence: Manifest Impediment. The original Article excepts from the limitation those cases in which, either "by reason of having absented himself," or by reason of "some *other* manifest impediment," the offender "shall not have been amenable to justice" within the period of the two years. The *absence* here indicated was defined by Choate J., of the U. S. District Court, in 1880,[1] as being "such an absence as interposes an impediment to the bringing of the offender to trial and punishment. It means absence from the jurisdiction of military courts—that is, absence from the United States."[2] This is the same absence as that subsequently *specified* in the Amendment, which may thus be regarded as construing the term "absence" in the original provision.

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[1] Captain Howe's Case, 6 Opins. At. Gen., 512. And see Id., 413; G. C. M. O. 85, Dept. of the Mo., 1869.

[2] "Except in the case of the offence of mutiny, desertion or fraudulent enlistment." Army Act, sec. 161.

As to the signification of the term "manifest impediment"—this, as held by the court in the case of Davison last cited,[3] refers to such conditions as the being held as a prisoner of war in the hands of the enemy, or the being imprisoned under the sentence of a civil court upon conviction of crime—during the whole or a portion of the period of limitation. More generally, the Attorney General defines this term as meaning "something akin to absence," *i. e.* "want of power or physical inability to bring the party charged to trial."[4] Circumstances falling short of this would not constitute an impediment under the Article. Thus the mere fact that by means of fraud, deceit, or otherwise, the commission of the offence had been concealed from the military authorities, would not be sufficient to affect the amenability of the offender.

Laches cannot be imputed to the Government;[5] on the other hand it is estopped from claiming that because not informed of an offence it could not prosecute it.[6] It need hardly be added that a delay to prosecute beyond the period of the limitation, caused by the fact that it was not convenient or deemed advantageous for the Government to prosecute before, can clearly not be treated as an "impediment." The party, if he is to be tried, is, as remarked by Attorney General Black, *entitled* to "a trial within the two years; he cannot be deprived of that right at the option of those who have the power to try him. If," it is added, "his superior officers could create impediments which would justify a delay beyond the prescribed period, the time of limitation would be a mere matter of discretion."[1]

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[1] *In re* Davison, 4 Fed., 510.

[2] It was held by the Attorney General, (14 Opins., 267,) that "absence," as here used, "meant absence from the reach or jurisdiction of the military authorities," or absence "where the military authorities by reasonable diligence could not make" the party "amenable to justice." But this is vague, and the definition of Judge Choate is considered the preferable one. It is the same indeed as had been previously adopted by the Judge Advocate General. Edition of 1886, p. 358.

[3] *In re* Davison, 4 Fed., 510.

[4] 14 Opins., 267.

[5] U. S. *v.* Kirkpatrick, 9 Wheaton, 720; Raymond *v.* U. S., 14 Blatchford, 52.

[6] In a case in G. O. 33, Dept. of the East, 1869, in which it was

As to cases of desertion in time of peace,—absence from the jurisdiction being alone specified in the amendment of 1890 as excepting such cases from the operation of the limitation, it is especially clear that a mere concealment of himself or of his identity, or other fraud or deception practiced by a deserter, by means of which he has avoided being brought to trial within the period of limitation, is not an "impediment" in the sense of the article:[2] it is indeed the business of the Government, supplied as it is with the forces and facilities for the purpose, to follow up a deserter with such diligence as to preclude, if practicable, such a result. Thus, that a soldier, on deserting, has enlisted in the Navy or the Corps of Marines, will not constitute such an impediment, because, while so enlisted, he is present within the jurisdiction of the United States and within the reach of the military authorities.[3]

Pleading and Procedure in view of the Article. As the statutory limitation is, according to the weight of authority, "matter of defence," it is not necessary, in a case in which the two years have expired, to allege in the specification the facts relied upon to except the case from the operation of the statute.

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claimed on the part of the prosecution that as "the Government did not know of the offence early enough to bring the accused to trial within two years," there had been an impediment in the sense of the Article, the reviewing commander, Gen. McDowell, well decided—"The accused cannot be deprived of his legal right by the inattention, delay, neglect, oversight, or any other fault or failing on the part of the Government. He is not responsible for them, and cannot be made to suffer by reason of them."

[1] 9 Opins., 184.

[2] 14 Opins. At. Gen. 52, 266–8. The ruling to a contrary effect in G. C. M. O. 55, Div. of Atlantic, 1890, must be held to be bad law.

[3] 14 Opins. At. Gen., 265; G. C. M. O. 63, War Dept., 1874.

Though it may affirmatively appear from the specification, (in connection with the convening order,) that the period of the limitation has fully elapsed, the charge is yet good in law and the specification not subject to be struck out on motion. If excepting facts exist they may well be averred, but to aver them is not essential either to give jurisdiction or to complete the pleading.

The specification and order showing, (as, where the fact exists, they almost invariably will,) or the fact being, that the limitation has taken effect, the accused, if he desires to raise the objection, (for he may, according to the late rulings, *waive* it if he sees fit,[1]) will (preferably) proceed to raise it by his special plea, orally or in writing; supporting the plea, where the essential fact does not appear from the record, by appropriate testimony. The plea being made, and proved by the record or otherwise, it will devolve upon the prosecution to rebut it by evidence of such absence or other impediment as shall be sufficient to except the case from the operation of the limitation.

Inasmuch as the objection may also be taken advantage of under the *general issue*,[2] the prosecution should, in any event, unless the accused expressly waives his right, be prepared to prove, and should prove in the course of the trial, the excepting fact or facts.[3]

The Limitation not affected by Provisions of other Articles—*Article 48*. It has been ruled by the Judge Advocate General and the Attorney General that the provision of the 48th Article of war, that a deserter shall be liable to render service to the United States for a period equal to that of his unauthorized absence, and shall remain triable for his desertion although the term of his enlistment may have elapsed prior to his apprehension, &c., cannot affect the operation of the 103d Article by extending the period of the limitatation in cases of deserters.[4] The two Articles, the 48th and 103d, (as amended,) are sections of the same code and, not being necessarily repugnant, both must be allowed full effect; and, in the absence of any expression to the contrary, the former provision must be regarded as subject to the general restrictions contained in the latter.

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[1] That the opinion of Atty. Gen. Wirt, (1 Opins,, 383,) that the limitation could not be waived, has been in effect overruled by recent decisions of the U. S. Circuit Court, see Chapter VIII.

[2] See *ante*.

[3] See G. O. 68 of 1829; Do. 52, Dept of the South, 1870.

[4] DIGEST, 125; 13 Opins. At. Gen., 462; 15 Id., 156; 16 Id., 170, 396. And see *In re* Bird, 2 Sawyer, 33.

Article 60. So, as has been held by the same authorities,[1] the provision of Art. 60, by which certain offenders are made amenable to justice after their discharge or other separation from the military service, is to be applied subject to the limitation of Art. 103.

Article 71. It might indeed be argued that this Article, in declaring that officers once arrested and released from arrest according to its terms "may be tried within twelve months after such release," rendered such officers subject to trial only within that period, and this notwithstanding that the two years' limitation of Art. 103 might still have a considerable time to run. But as both Articles are embraced together in the same code, full force is to be given to each so far as practicable. It is therefore deemed to be the reasonable construction to be placed upon the concluding clause of Art. 71 to view it as if there were added thereto the words—"subject to the provisions of Art. 103;" the effect thus given to it being that the "twelve months" are neither to extend nor reduce the time within which an offender is held amenable to trial by the latter Article.

It will thus be seen that the military statute of limitations admits of no exceptions to its operation other than such as are indicated in the statute itself.

THE PLEA OF FORMER TRIAL FOR THE SAME OFFENCE.

Similar at Military and at Criminal Law. This is the plea by which an accused party avails himself of the principle incorporated in the 102d Article of the military code, *viz*:—"*No person shall be tried a second time for the same offence.*"

In the criminal procedure the defendant takes advantage of this principle by means of one of the two pleas of former acquittal, (*autrefois acquit*,) or former conviction, (*autrefois convict*,) according as he has been acquitted or convicted at the former trial. But these two pleas are governed by the same rules,[2] and each is but the declaration of the same fact—that a trial has been had. The rulings thereupon by the civil courts will therefore be applicable to similar cases at military law.

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[1] DIGEST, 124; 14 Opins. At. Gen., 53.

[2] 1 Chitty, C. L., 463; State *v.* Elden, 41 Maine, 169.

Former Trial and "Jeopardy" Identical. That no man shall be liable to be twice tried or punished for the same offence, was an ancient maxim of the common law, which derived it from a still earlier period.[1] Whether or not recognizable, as has been supposed, in Magna Charta,[2] it may certainly be traced in the precept of the Roman civil law—*non bis in idem.*[3] Brought over to this country by our ancestors as one of their common law privileges,[4] it was incorporated in the Constitution of the United States in a form similar to that in which it originally appears in the early cases and writings in criminal law,[5] as follows—"*nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.*" And the same or a similar provision is contained in the Constitutions of a majority of the States. That it takes this form is explained by the fact that, at the period of its origin, all the considerable offences in regard to which this right of defence would be asserted were felonies punishable capitally or by dismemberment.[6] In the present state of the law, indeed, the provision, as worded in the Constitution, applies, strictly, to but two or three crimes, as treason, murder, and piracy; but, construing it in the light of its original bearing and its manifest spirit, the U. S. courts generally have viewed it as covering in principle all other crimes,[7] and have held the phrase "put in jeopardy" to mean practically the same as *tried;*[8] thus giving to such provision substantially the effect of the declaration expressed in the military statute.

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[1] U. S. *v.* Gibert, 2 Sumner, 38, 42.

[2] U. S. *v.* Gibert, *ante;* Burns *v.* People, 1 Park., 184; State *v.* Townsend, 2 Harr., 543.

[3] Klock *v.* People, 2 Park., 682.

[4] McGinnis *v.* State, 9 Humph., 49; State *v.* Cooper, 1 Green, 370.

[5] U. S. *v.* Gibert, 2 Sumner, 39–41; Vaux's Case, 4 Coke, 45.

[6] Com. *v.* Roby, 12 Pick,, 502; State *v.* Elden, 41 Me., 169; People *v.* Goodwin, 18 Johns., 200.

[7] U. S. *v.* Gibert, 2 Sumner, 19, 45; 1 Bishop, C. P. § 990.

[8] U. S. *v.* Perez, 5 Wheaton, 579; U. S. *v.* Haskell, 4 Washington, 409, U. S. *v.* Gibert, 2 Sumner, 38; U. S. *v.* Shoemaker, 2 McLean, 114; U. S. *v.* Watkins, 3 Cranch C., 443; U. S, *v.* Riley, 5 Blatchford, 204; 1 Opins. At. Gen., 294; DIGEST, 118. "This clause in the Constitution may be considered equivalent to a declaration of the common law principle that no person shall be twice *tried* for the same offence."

Meaning of "Tried" and "Trial." In so ruling, these courts have further held that the "jeopardy" or "trial" means the prosecution of a case to a verdict; that unless the case has proceeded at least to an acquittal or a conviction, there has been no trial and therefore no jeopardy.[1] Similarly the word "tried" in Art. 102 is to be interpreted as meaning *duly prosecuted before a court-martial to a legal conviction or acquittal.*[2] After such a conclusion the Article prohibits a further trial of the accused except, (as will hereafter be indicated,) by his own waiver and consent.

Immaterial whether there has been a Sentence adjudged. It is further held by the weight of authority that, to complete the trial, no judgment or sentence is requisite.[3] Thus, while in the military procedure a sentence properly follows at once and as a matter of course upon a conviction, a court-martial will properly hold an accused to have been "tried" in the sense of the 102d Article, when he has been duly acquitted or convicted, without regard to whether, in a case of conviction, a sentence or a legal sentence has been adjudged.[4]

Immaterial whether any or what Action has been taken on the Proceedings by the Reviewing Officer. Further, where the accused in a military case has been once duly acquitted or convicted, he has been "tried" in the sense of the

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Com. *v.* Roby, 12 Pick., 502. It is "an explicit and solemn recognition of the maxim of the common law that no man shall be twice tried for the same offence." Hartung *v.* People, 26 N. Y., 182. [It may be noted, however, that the rulings of the *State* courts on this subject are variant; some holding that a prisoner is in "jeopardy" when he has once been put on his trial before a jury duly empanelled and sworn.]

[1] See authorities cited in last note. A verdict of a *jury* is indeed not essential; the trial may have been had before a judge similarly authorized to hear and determine. State *v.* Hodgkins, 42 N. H., 476; State *v.* Andrews, 27 Mo., 267.

[2] And this is also the rule of the British military code. Army Act, sec. 157.

[3] This was the view of Justice Story, in U. S. *v.* Gibert, 2 Sumner, 58, with which is the very decided weight of modern authority.

[4] So it is quite immaterial whether an adequate or inadequate punishment may have ensued. DIGEST, 120.

Article, although no action may have been taken upon the finding or proceedings by the reviewing authority. Nor has he been any the less "tried" where the finding has been formally *disapproved*, by such authority.[1] For the finding is no less a consummation in law of the *trial*, though, from a cause beyond the control both of the accused and the court, such finding has been rendered ineffectual.

To Sustain the Plea, the former Trial must have been a legal one.

1. It must have been before a competent court having jurisdiction. If the former court either had no legal origin or existence, or was without jurisdiction of the offence or the person, the trial was a nullity, there was in law no trial, no jeopardy, and the plea cannot be sustained.[2] Thus if, upon a plea of former trial, it appeared that the alleged "trial" was an investigation by a "court of inquiry,"[1] or by a court not duly constituted or composed—as where it was convened by an unauthorized officer, or was made up, (in whole or in material part,) of officers not qualified to sit on the trial; or that it was a trial by a regimental or garrison, or a summary, court of a capital offence,[2] or by a general court of an offence cognizable exclusively by a civil court;—in any such case there would have been no former trial in law, and the plea would not be tenable.

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[1] DIGEST, 119–120. And see Macomb, 72; O'Brien, 277; Bombay R., 45. A contrary ruling was made on this point by the Secretary of War in 1844, in the case of Lieut. D. C. Buell, on the ground that a disapproval renders a finding inoperative. And a similar view was expressed by Gen. Canby in G. O. 32, Dept. of La., 1866. But though a finding may be nullified by the act of a higher power, it is no less a complete and legal conclusion by the *court* of the *trial;* and to hold that a finding, if disapproved, cannot be pleaded in bar of another trial would be to subject an officer or soldier to be tried a second time or an indefinite number of times at the will of his commander, where he was acquitted when the latter thought he should be convicted, or if convicted, was not, in the commander's opinion, punished with sufficient severity. But the Articles of war, while making an approval by the commander necessary to the *execution* of the judgment of the court, (Art. 104,) have not provided that such action shall be essential to complete a *trial.*

[2] 2 Hawkins, c. 35, s. 10; 1 Chitty, C. L., 458; Wharton, C. P. & P., § 438; Stevens *v.* Fassett, 27 Maine, 282; State *v.* Elden, 41 Id., 170; Marston *v.* Jenness, 11 N. H., 162; Com. *v.* Roby, 12 Pick., 502; 11 Opins. At. Gen., 140; De Hart, 141; DIGEST, 118–119. "We think the party accused, not having been tried before a tribunal legally constituted, may be brought to trial before a competent tribunal; * * * for this is not the case of re-hearing the charge, but a case in which there has been no trial at all, the court having been illegally constituted." Opinion of Crown Lawyers in Boatswain Maxwell's Case, tried by naval court-martial in 1828. Hickman, 124. In G. O. 16, Northern Dept., 1865, it was held that there had been no "former trial" because the court, at the time of the supposed trial, had in fact been duly dissolved, and had therefore no legal existence. And see G. O. 72 of 1841.

2. *The former indictment, or charge, must have been legally sufficient.* It has further been uniformly held that the indictment upon which the accused was first brought to trial must have been valid and sufficient in law, and that if it was materially and in substance defective there has been no jeopardy upon which the plea can be based.[3] And the test applied to the indictment in such cases is—whether the same was one upon which a valid judgment could have been pronounced, or a judgment or sentence not liable to be reversed on account of defects in such indictment.[4] Similarly, in a case of a military charge of which the specification, by reason of the omission of some material averment, is substantially defective, an acquittal or conviction upon such charge will not protect the accused against a further prosecution for the offence intended to be but not alleged.[5] So—though such case will be rare—a charge upon which an accused has been acquitted or convicted may be so vague and indefinite as that the finding had thereon will be no bar to a second trial for the same offence properly pleaded.[6]

3. *The proceedings of the former trial must have been without fatal defect.* To make tenable the plea under consideration, the proceedings of the former trial must have been

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[1] See Marston *v.* Jenness, 11 N. H., 156; Wilkes *v.* Dinsman, 7 Howard, 123.

[2] See G. C. M. O. 32, Dept. of the East, 1892.

[3] 2 Hawkins, c. 35, s. 8; 1 Chitty, C. L., 452, 462; 2 Gabbett, 334; Wharton, C. P. & P. § 507; U. S. *v.* Shoemaker, 2 McLean, 117, 120.

[4] 2 Hawkins, c. 35, s. 8; 1 Chitty, C. L., 454; Com. *v.* Olds, 5 Litt., 140.

[5] See DIGEST, 119.

[6] See De Hart, 145. And compare U. S. *v.* Shoemaker, 2 McLean, 120; Com. *v.* Hatton, 3 Grat., 623.

"according to law;"[1] or, as it is expressed by Bishop,[2] all the "preliminary things of record," necessary to sustain the verdict must have been "complete." Thus if upon a military trial the court is omitted to be sworn as provided in the 84th Article,[3] or for any cause is reduced to less than five members at the finding,[4] or its proceedings are invalidated by other fatal defect,[5] its acquittal or conviction will not constitute a legal trial pleadable in bar of a subsequent prosecution. But the defect must be absolutely fatal, not merely a serious irregularity furnishing ground for disapproval.

4. The finding itself must have been complete and valid. It may happen that although the proceedings at the former hearing were regular and legal down to the finding, *this* may have been so erroneous or imperfect as not to constitute legal jeopardy.[6] Thus a jury, in convicting, may find but a part of the matters put in issue in the indictment;[7] or may make a special finding omitting to include some essential element of the crime, as malice;[8] or may find the defendant guilty of an offence wholly distinct in law and fact from that charged.[9] So, a court-martial may find the accused not guilty of the specification, where there is but one; or not guilty of all the specifications, and yet guilty of the charge;[1] or not guilty of the specific offence charged but guilty of another and distinct specific offence not included in it;[2] or not guilty of "conduct to the prejudice of good order and military discipline," but guilty of a specific offence;[3] or it may in its finding of guilty on the charge make such exceptions from the specification or charge as not to leave enough to constitute the offence charged or any offence.[4] In all such cases there will have been no legal finding and therefore no legal trial upon which the present plea can be predicated.

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[1] Com. *v.* Goodenough, Thach., 133.

[2] 1 C. L. § 1020. There must not have been what is known as a "mis-trial." See DIGEST, 119.

[3] See 3 Opins. At. Gen., 398.

[4] DIGEST, 87, 88, 119. And compare Brown *v.* State, 8 Blackf., 561, where, it appearing from the record "that the cause had been tried by eleven jurors, the court held the trial to be a nullity, set aside the judgment, and remanded the cause for another trial." And see 1 Bishop, C. L. § 1040.

[5] See Macomb, 41.

[6] The accused must be *legitimo modo acquietatus.* Vaux's Case, 4 Coke, 45.

[7] "No judgment can be given on a verdict which leaves undecided any part of the matter put in issue." King *v.* Hayes, Ld. Raym., 1518. And see U. S. *v.* Watkins, 3 Cranch, 570; State *v.* Sutton, 4 Gill, 497. Or where the verdict is not "responsive to the indictment." State *v.* Dingee, 17 Iowa, 232.

[8] Webber *v.* State, 10 Mo., 40.

[9] Com. *v.* Smith, 2 Va. Cas., 327; State *v.* Spurgin, 1 McCord, 252; State *v.* Valentine, 6 Yerg., 533; State *v.* Mead, 4 Blackf., 309; Wright *v.* State, 5 Ind., 527.

Discontinuance before Finding not equivalent to Acquittal or amounting to Jeopardy. It remains to notice the principle, applicable equally to civil and military cases, that where, instead of a complete trial on the merits, the proceedings are discontinued by some interlocutory action, the accused, though not in fault, is not to be regarded as having been acquitted or put in jeopardy. Thus where an indictment has been duly abated by the entry of a *nolle prosequi*, or on a motion to quash, demurrer, or other proceedings;[5] or where the trial has been broken off by reason of the death or disability of a juror or the judge, or of the defendant himself;[6] or where by reason of an irreconcilable difference of opinion among the jurors the jury has been discharged[7]—the defendant has not been legally "tried" and cannot plead *autrefois acquit* upon a separate trial for the same offence. So, at military law, neither a mere arraignment,[1] nor an arrest followed by a discharge without trial,[2] nor a service of charges withdrawn or dropped without prosecution, nor a withdrawal of the charges after arraignment or pending the trial,[3] nor a discontinuance of the proceedings, by the order of the convening authority, for any cause before a finding,[4] nor a permanent interruption of the same by reason of war or other exigency, nor a failure of the court to agree upon a finding, followed by a dissolution[5]—will amount to an acquittal or a "trial" of the accused.

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[1] See this form of finding disapproved as a nullity in G. O. 60, Army of the Potomac, 1861; Do. 95, 107, Id., 1862; Do. 6, Dept. of Cal., 1865; Do. 9, Dept. of the Gulf, 1873.

[2] See this finding similarly disapproved in G. O. 14, 27, Army of the Potomac, 1864; Do. 231, Fifth Mil. Dist., 1869.

[3] See this finding similarly disapproved in G. C. M. O. 78, Dept. of the Mo., 1874; Do. 6, Dept. of the Gulf, 1876.

[4] See findings of this nature disapproved in G. O. 34, Dept. of the Mo., 1863; Do. 20, 54, Northern Dept., 1864, Do. 28, Dept. of the N. West, 1865; Do. 41, Dept. of the Platte, 1870; Do. 6, Id., 1871.

It should be noted here, as applicable generally, that though for any of the causes mentioned the trial may not have been a legal one, yet if the accused, having been convicted thereon, has *undergone a sentence* thereupon adjudged, he is not again amenable to trial for the same offence. 1 Bishop, C. L. § 1023; Com. *v.* Loud, 3 Met., 328.

[5] People *v.* Barrett, 1 Johns., 69; Stevens *v.* Fassett, 27 Maine, 282, 1 Bishop, C. L. § 1014, 1021.

[6] 1 Bishop, C. L. § 1032; Wharton, C. P. & P. § 508; U. S. *v.* Shoemaker, 2 McLean, 117; U. S. *v.* Haskell, 4 Washington, 402.

[7] U. S. *v.* Perez, 9 Wheaton, 579; 1 Bishop, C. L., § 1033, and cases cited; Kelly *v.* U. S., 27 Fed., 616.

The Offence for which the Former Trial was had must be the same as that which is the Subject of the Pending Trial. This, or the shorter phrase—"the offences must be the same," is substantially the form in which the proposition is usually expressed.[6] Strictly, however, the more accurate statement would be, that, to sustain this plea, the offences must be either:—(1) Identical, or (2) So related, from the fact that one is included in the other, that an acquittal or conviction of the one necessarily puts the accused in jeopardy of the other.

Identical Offences. The identity must, it is held, be one both *in law and in fact;* for, as remarked by Chief Justice Shaw in Commonwealth *v.* Roby,[7]—"It is obvious that there may be great similarity in the facts where there is a substantial legal difference in the nature of the crimes; and, on the contrary, there may be considerable diversity of circumstances where the legal character of the offences is the same. As where most of the facts are identical, but by adding, withdrawing or changing some one fact, the nature of the crime is changed."

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[1] Compare State *v.* Benham, 7 Conn., 418.

[2] De Hart, 142, 145; Benét, 100; 1 Opins. At. Gen., 294; Marston *v.* Jenness, 11 N. H., 156.

[3] DIGEST, 119.

[4] DIGEST, 119.

[5] DIGEST, 119.

[6] See 1 Bishop, C. L. § 1049.

[7] 12 Pick., 503. And see State *v.* Elden, 41 Maine, 170; Burns *v.* People, 1 Park., 182.

The identity need be *substantial* only:[1] it is not essential that the indictments or charges should be expressed in the same language. The circumstance alone that different words are used in setting forth the offences does not indicate that they are not the same, for the same offence may be expressed in different terms in two indictments or charges.[2] In a case of doubt, the usual test of their identity is, the determination of the question whether the the same evidence will support both.[3]

Instances of offences held not identical but distinct. Where, by the application of this test, the offences are ascertained to be not identical but distinct, a plea of former trial cannot of course be sustained.[4] Offences relating to the same subject matter may yet be quite distinct in that the one is not characterized by some essential fact and legal element necessary to constitute the other. For example, a trial for *embezzlement* cannot be pleaded in bar of a trial for the same act charged as *larceny*, or *vice versa*, since the former offence, which consists in the appropriation of property by the party to whose charge it has been committed by the owner, is quite distinct from the latter, which is a taking without the consent and against the will of the owner. So, of the two offences of the larceny of certain articles and of the receiving and concealing of the same articles; these offences being distinct in that the latter is characterized by an *animus* quite other than that of conversion to the party's own use, an essential feature in larceny.[5] So, the offences of larceny of certain property and burglary with intent to commit a larceny of the same property are held to be so distinct that a trial for the one cannot be pleaded in bar to a trial for the other.[6] So, a conviction or acquittal of a simple assault and battery has been held to be no bar to a trial for the same assault with intent to commit a felony.[1] And a conviction of assault and battery has been declared no bar to an indictment for manslaughter for the killing of the same person, who had meanwhile died of the assault.[2]

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[1] See 2 Gabbett, 330.

[2] 1 Bishop, C. L. § 1050. And see Wilson *v.* State, 24 Conn., 57, 69.

[3] 1 Bishop, C. L. § 1051; Com. *v.* Olds, 5 Litt., 139; Com. *v.* Curtis, Thach., 207; State *v.* Birmingham, 1 Busbee, 122; Durham *v.* People, 4 Scam., 173; Simco *v.* State, 9 Texas Ap., 338, Rex *v.* Sheen, 2 C. & P., 634.

[4] 1 Chitty, C. L., 452.

[5] Foster *v.* State, 39 Ala., 229.

[6] Wilson *v.* State, 24 Conn., 57; State *v.* Warner, 14 Ind., 572; Howard *v.* State, 8 Texas Ap., 447.

Further, two or more offences, though committed at the same time, by the same act, and as parts of the same transaction, may, if separable, be wholly distinct in law, so that a conviction or acquittal of one cannot be pleaded in bar to a trial for another. Thus a person by the same blow, shooting, or other violence, may kill or injure two different individuals; but a trial for the murder, manslaughter, or assault and battery of one of them will furnish no defence to a trial for the same act committed against the other.[3] So, where articles of property belonging to different owners are stolen at the same time by the same person, a conviction or acquittal on an indictment for stealing property of one of the owners will not, as it has been held,[4] (though the authorities on this point are variant,) bar a trial for stealing articles belonging to another.

These remarks and rulings are applicable to military cases. To add instances from the military service of distinct offences committed at the same time and in and by the same act,—the offence of mutiny, or joining in mutiny, may involve with it a violation of Art. 21; so, the offence of behaving with disrespect to a commanding officer may concur with that of a disobedience of his order; so, the offence of disobedience of orders, or of absence without leave, may concur with the offence of misbehaviour before the enemy. Yet a trial for one of these concomitant offences would not operate as a legal bar to a subsequent prosecution for the other.

Military and civil crimes involved in same act. A further class of offences, apparently identical but distinct in law, may here be noticed. These are the offences which, though involved in the same act, are distinct in this, that, while one is an offence against the ordinary criminal law of a State or of the United States, the other is a breach of military discipline made exclusively punishable by the Articles of war. Thus a soldier convicted by a general court-martial, under Art. 21 or 22, of an offering of violence or mutinous act which resulted in the killing of a superior officer, would remain liable to an indictment for murder in a State or U. S. Court, on account of the homicide involved; and *vice versa.* Where indeed the offences are crimes of which military courts are invested with jurisdiction concurrently with the criminal courts, (as, for example, the crimes cognizable by courts-martial under Art. 58, in time of war,) the same are not distinct but identical in law, and an acquittal or conviction of one of such offences, or rather of the actual single offence, in a civil court will, be a complete bar to a prosecution of the same in a military court, and *vice versa.*[1]

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[1] State *v.* Hattabough, 66 Ind., 223.

[2] State *v.* Littlefield, 70 Maine, 452; 1 Bishop, C. L., § 1059.

[3] Wharton, C. P. & P. § 468, 469; State *v* Standifer, 5 Port., 531; Vaughan *v.* Com., 2 Va. Cas., 273; Greenwood *v.* State, 64 Ind., 250.

[4] Wharton, C. P. & P. § 470; 1 Bishop, C. L. § 1061, and cases cited.

The subject of double amenability for and jurisdiction of military and civil offences involved in the same acts has been considered in a previous Chapter.[2]

Offences of which the One is included in the Other. The cases in which offences are so far included the one within the other, and at the same time so legally related to each other, that an acquittal or conviction of the one will bar a trial for the other, may be divided into three classes, as follows:—

1. Cases where the offence which is the subject of the pending trial is included within the offence which was the subject of the former trial, and is one so related to it in law that under an indictment for the major offence there may legally be a conviction of the minor.[3]

Here a previous conviction or acquittal of the major offence will be a bar to the prosecution for the minor; in other words a conviction or acquittal of the whole is a conviction or acquittal of every part. Thus an acquittal upon an indictment or charge for murder is a bar to a subsequent trial for the same homicide charged as manslaughter, since the latter crime is necessarily included in the former, which is also unlawful killing with the additional element of deliberate evil purpose, and since under an indictment for murder there may legally be a conviction of manslaughter. So, a verdict upon a trial for robbery is a bar to a trial for a larceny of the property taken, since every robbery includes a larceny, (with the additional element of force or intimidation,) and since also there may legally be a conviction of larceny under an indictment for robbery. So, for similar reasons, a trial for an assault and battery may be pleaded to a prosecution for the assault. Similarly, at military law, a conviction or acquittal of desertion may be pleaded in bar of a trial for the minor offence of the absence-without-leave included in it. Nor can one tried for any specific military offence be subsequently tried for the disorder or neglect, to the prejudice of good order and military discipline, which may have been involved therein.[1]

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[1] Coleman *v.* Tennessee, 97 U. S., 513-5; People *v.* Gardner, 6 Park., 1 3; G. O. 29, Dept. of the N. West, 1864; Do. 32, Dept. of La., 1866; 1 Kent Com., 341, note; DIGEST, 49

[2] See Chapter XIII, p. 124, and cases cited.

[3] "A former conviction is a bar to a trial for any offence of which the defendant might have been convicted under the indictment and proof in the first case." State *v.* Nunnelly, 43 Ark., 68.

2. Cases where, under an indictment or charge for the major offence, the accused has actually and legally been convicted of the minor included offence, and is again brought to trial for the major offence.

In such cases the accused has been fully tried for the major offence and convicted of such part of it as he was found to have committed. Such conviction thus operates as a perfect bar.[2] For, as it is expressed in an adjudged case[3]—"The jury, in contemplation of law, render two verdicts, one acquitting the accused of the higher crime charged in the indictment, the other finding him guilty of an inferior crime. * * * The verdict of manslaughter is as much an acquittal of the charge of murder as a verdict pronouncing his entire innocence would be." Upon the same principle, if an accused, charged with robbery, were convicted of larceny only, he could plead such conviction in bar of a second trial for the robbery. So, a conviction of absence-without-leave under a charge of desertion; or of "conduct to the prejudice of good order and military discipline" under a charge of "conduct unbecoming an officer and a gentleman" or under a charge of any specific military offence, is a bar to a subsequent trial for the offence originally charged.

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[1] See DIGEST, 118. In G. O. 55, Dept. of the Tenn., 1866, an acquittal upon a charge of assault and battery with intent to kill—a specific offence made punishable by the present Art. 58—was properly held to be a bar to a second trial for the same battery, charged as a disorder "to the prejudice," &c.

[2] Wharton, C. P. & P., § 465; 1 Bishop, C. L., § 1056, Hurt *v.* State, 25 Miss., 378; Brennan *v.* People, 15 Ills., 517; State *v.* Norvell, 2 Yerg., 27.

[3] Hurt *v.* State, *ante.*

3. Cases, the reverse of those of the 1st class, where, after a trial for a minor offence which is included in a certain major offence, the accused is brought to trial for the latter.

Here, by the weight of modern authority, the former trial is held pleadable in bar, provided the minor offence is one of which there could be a legal conviction under an indictment or charge for the major.[1] The principle of course is that, as the accused, upon the second trial for the major offence, is legally liable to be convicted of the minor included offence, he is by this trial again put in jeopardy for an offence for which he has already been once tried.[2] Upon this principle an acquittal, upon an indictment for manslaughter, is held pleadable in bar to a second trial for the same homicide charged as murder;[3] a conviction upon an indictment for larceny is similarly held to bar a trial upon a charge of robbery founded upon the same transaction;[4] and a conviction of an assault is held to be a bar to a trial for the battery committed at the same time.[5]

Courts-martial being governed in general by the rules of evidence applicable to criminal cases,[6] a trial upon a charge of absence-without-leave would properly be held pleadable in bar of a subsequent trial for a desertion charged to have been actually committed in and by the same unauthorized absenting of himself by the accused; and a trial for a disorder or neglect under Art. 62, in bar of a subsequent trial for a specific offence which the same disorder or neglect was claimed to have amounted to.

The Form of the Plea, and the Evidence to sustain it—***Form of the Plea.*** "This plea," to employ the description of Chitty,[1] "is of a mixed nature, and consists partly of matter of record and partly of matter of fact. The matter of record is the recital of the former indictment and acquittal or conviction; the matter of fact is the averment of the identity of the offence and of the person."

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[1] 1 Bishop, C. L. § 1057; And see Com. *v.* Squire, 1 Met., 264–5.

[2] 1 Bishop, C. L. § 1057.

[3] 2 Gabbett, 33; 1 Bishop, C. L. § 1058; Wrote's Case, 4 Coke, 45; Holcroft's Case, Id., 46; Com. *v.* Curtis, Thach., 206; Com. *v.* Roby, 12 Pick., 504.

[4] State *v.* Lewis, 2 Hawks, 98.

[5] State *v.* Chaffin, 2 Swan, 93, where the court say: "The one is a necessary part of the other; and if he be now punished for the battery, he will thereby be twice punished for the assault" included in it.

[6] See Chapter XVIII.

In the military practice, therefore, the plea, (which should preferably be in writing,) will properly consist of a statement to the effect that, by a court-martial convened by a certain described order, the accused was, on or about ———, (giving the prior date or time of the trial,) duly tried upon a charge of ———, (reciting the charge and specification or specifications in full or in substance,) and was duly acquitted or convicted of such charge, &c.;[2] and that the offence for which he was so tried and acquitted, or convicted, is the same with the offence set forth in the charge to which the plea is made. Or if the offences are not identical, an averment should be substituted to the effect that the offences are so related that the conviction or acquittal of the former operated as a bar to a trial for that which is the subject of the pending prosecution. While the plea in a military case need not be so technical as in the criminal procedure, a mere general plea that the accused had been previously tried for the same offence, without any of the particulars above indicated, would, strictly, be insufficient, and the court would be justified in declining to entertain it without amendment.[3] A plea, indeed, thus or otherwise imperfect in form, (or a plea showing on its face that the former court was an unauthorized body or without jurisdiction, or that the charge was an insufficient basis for a finding, or that the finding was not a legal one, &c.,) would be liable to be *struck out on motion* of the judge advocate. The court, however, would properly afford the accused reasonable time to amend and complete his plea.

Explanation of variance. If there appear on the face of the plea any material variance between the two charges, as to name of person, description of property, place, date, &c., such variance should properly be explained by a special averment of fact sufficient to reconcile the two in law; otherwise the plea may run the risk of being disallowed.[1] So, where, since the former trial, the rank, or office, regiment, corps, &c., of the party has been changed, an averment will properly be added stating the fact and explaining the cause of the change and exhibiting the identity of the accused.

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[1] 1 C. L., 459.

[2] A copy of the Order of publication of the proceedings, (if any was issued in the original case,) exhibiting the charges, findings, &c., may well be incorporated with or appended to the plea. As to the use of the same as *evidence*, see *post*.

[3] Compare Atkins *v.* State, 16 Ark., 573; Wortham *v.* Com., 5 Rand., 677.

Evidence to sustain the Plea. The burden of the proof of the plea is of course upon the accused.[2] It will be for him to establish—(1) the existence of a record of a legal acquittal or conviction; (2) the fact of the identity of the person and offence. The quality and extent of the evidence required in a particular case will depend upon the issue made: the prosecution may traverse, orally or by written "replication," either the entire plea or one or more of its averments.[3]

Proof of the record. The record in a military case is commonly proved by a copy of the original as recorded in the Judge Advocate General's Department, (or—if a record of an inferior court—at the Headquarters of the military Department,) authenticated by the legal custodian in the form usually practiced for the purpose. If the accused, prior to the arraignment, has not had a reasonable time within which to procure the copy, he will be entitled to a continuance under Art. 93.[4] The judge advocate, however, may admit the existence of the record and its contents as stated in the plea, contesting only the legality of the finding or the identity of the accused. It will then not in general be necessary to procure a copy of the record: a copy indeed of the General Order promulgating the proceedings of the former trial, and setting forth the convening of the court and the trial, the charges and specifications in full, and the findings, may in such case be quite sufficient for the use of the parties and to inform the court. If it is the legality of the trial which is contested, the issue must be determined upon the record itself, (or the Order as presenting its main features;) no extrinsic evidence being admissible to vary or contradict it.[1] If upon the face of the record, (or from the Order as its substitute,) it appears that the court was not legally constituted, or was without jurisdiction, or that the proceedings were fatally irregular, or that the charge or finding was insufficient in law,—the defect cannot be remedied by other testimony, and the plea, upon the principles heretofore considered, must be overruled.

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[1] Compare State *v.* Risher, 1 Rich., 219.

[2] Com. *v.* Daley, 4 Gray, 209; Wharton, C. P. & P., § 481, 483. That the accused must prove his plea; that the court cannot accept it as true on his mere statement without evidence—see G. O. 33, Dept. of Arizona, 1877.

[3] Wharton, C. P. & P. § 483; Duncan *v.* Com., 6 Dana, 295.

[4] 2 Gabbett, 334; 1 Chitty, C. L., 459; State *v.* DeWitt, 2 Hill, 241-2; Com. *v.* Myers, 1 Va. Cas., 232.

Proof of identity. To establish, however, the averment of identity, either as to person or as to offence, evidence outside the record is admissible.[2] Whether indeed the offences are the same will in general be apparent from a comparison of the circumstances, names, places and dates, set forth in the specifications of the two charges. But where there is a material and substantial variance between them, some evidence, such as the testimony of the officer or officers who preferred or investigated the several charges, the judge advocate who conducted the original prosecution, or other individuals familiar with the facts, will be necessary to assimilate the offences.[3] As to the identity of the *person*, —evidence on this point will be especially called for where a considerable period has elapsed since the former trial, and the soldier then appeared under an *alias* or has since changed his name, and the second trial is ordered at a station remote from that of the first: in such cases some testimony such as that of a member or the judge advocate of the former court, or of a witness at the trial, or other person then present or otherwise recognizing the accused as the same individual, will be required to sustain the plea.

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[1] Douglass *v.* Wickwise, 19 Conn., 489; Martha *v.* State, 26 Ala., 75.

[2] Wharton, C. P. & P. § 481; People *v.* McGowan, 17 Wend., 415; Do. *v.* Barrett, 1 Johns., 69; Dunn *v.* State, 70 Ind., 47.

[3] Compare 2 Gabbett, 330–1; Wilson *v.* State, 24 Conn., 63; Durham *v.* People, 4 Scam., 172; People *v.* McGowan, 17 Wend., 389. Where the two indictments clearly set forth distinct offences, there can be no question of variance, and no evidence to assimilate the offences will be admissible. Martha *v.* State, 26 Ala., 72.

Waiver of the Right to Plead Former Trial. It is now abundantly established by the adjudications in criminal cases that the constitutional right to be exempt from being twice put in jeopardy, or twice tried, for the same offence, being for the sole benefit of the accused party, may be, expressly or impliedly, *waived* by him.[1] The same principle has been recognized at military law. It was held by Attorney General Wirt, in 1818, that the provision of the Articles of war, that "no person shall be tried a second time for the same offence," did not apply to a case in which the accused, upon a conviction and sentence being disapproved by the reviewing authority, himself applied for a new trial; the right to take advantage of the provision of Art. 102 being thus deemed to be waived.[2] An accused would, it is believed, also waive by implication this right, where he applied to the reviewing authority or President to have a conviction and sentence in his case disapproved or pronounced invalid on the ground of illegality, and this action was taken as requested.[3] An accused, who had in fact been previously tried for the same offence, would also waive this right by intelligently pleading guilty or not guilty without interposing the special plea under consideration.[4]

Pleading over. The plea of former trial being overruled by the court, the accused will be required to plead over to the charge upon the merits, either guilty or not guilty, precisely as if no plea in bar had been interposed.[5] This special plea and the plea of the general issue should be kept quite distinct in practice; the former being disposed of before proceeding to the other.[1] And the accused cannot properly be allowed to put the fact of the former acquittal or conviction in evidence under the general issue of not guilty, but should in all cases plead it specially.[2]

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[1] 1 Bishop, C. L. § 992, 995, 998, 1001, &c., Wharton, C. P. & P. § 518; U. S. *v.* Harding, 1 Wallace Jr., 127; State *v.* Gurney, 37 Maine, 156; Veatch *v.* State, 60 Ind., 291; Brennan *v.* People, 15 Ills., 511.

[2] 1 Opins., 233. As to the few cases in which similar action has since been taken in the military practice, see DIGEST, 536. The new trial has generally been granted as a special indulgence to the accused in lieu of approving and executing his conviction and sentence.

In connection with the view of Mr. Wirt that the benefit of the provision of Art. 102 may be waived by the accused, may well be noted his view, expressed two years later in 1 Opins., 383, that the benefit of the provision of Art. 103 may *not* be waived. (See *ante*, Chapter VIII, p. 99 and note.) It would seem that if either Article was to be regarded as absolute or prohibitory, it would be the former rather than the latter.

[3] Compare 1 Bishop, C. L. § 998.

[4] See *post*—"Pleading over."

[5] Wharton, C. P. & P. § 486. Com. *v.* Goddard, 13 Mass., 460; Benét, 108.

PLEA OF PARDON.

A pardon is an act of grace and mercy presupposing only the commission of an offence;[3] and it is well settled that, under the plenary power conferred upon him in this respect by the Constitution, the President, while not often exercising the same before conviction,[4] may legally pardon an offender even in advance of trial.[5] Hence the legality and fitness of a *plea of pardon* in a case where, after such action, the party is sought to be prosecuted.

Leaving the subject of the nature and extent of the pardoning power in military cases to be more appropriately considered in treating of the function of the Reviewing Authority under the 112th Article of war,[6]—we will here notice in brief:—I. The occasions and grounds for the plea of pardon in the military practice; II. The form and proof of the plea; III. The procedure upon the plea.

I. OCCASIONS AND GROUNDS FOR THE PLEA.

This plea may be offered:—1, Where the accused has been specially formally pardoned; 2, Where he is included in a general act of pardon or amnesty; 3, Where he has been pardoned constructively.

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[1] "They are distinct issues, and the jury must be separately charged with them." Until the issue under the special plea is disposed of, "there can be no trial in chief." Henry *v.* State, 33 Ala., 399, 400. And see Foster *v.* State, 39 Ala., 229; Dominick *v.* State, 40 Ala., 680.

[2] State *v.* Barnes, 32 Maine, 530; Com. *v.* Olds, 5 Litt., 140. The defence of former trial is thus distinguished from that based upon the statute of limitations; the latter may be taken advantage of upon the general issue. See *ante.*

[3] 1 Opins. At. Gen., 342; 6 Id., 21; *Ex parte* Wells, 18 Howard, 311.

[4] "A variety of considerations seem to me to render it inexpedient, generally, to interpose the pardoning power previous to trial." Atty. Gen. Berrien, 2 Opins., 275. And see 5 Id., 729; 6 Id., 21.

[5] 1 Opins. At. Gen., 342; 6 Id., 20–1, 405; 8 Id., 283–4; 11 Id., 227. "The power extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment." *Ex parte* Garland, 4 Wallace, 380.

[6] See Chapter XXI.

1. Special Pardon. Special formal pardons of military offenders by the President have not been frequent; prior to conviction they have been most rarely extended; and no instance is known of the specific pleading of one upon an arraignment before a court-martial. Such a pardon, duly pleaded, would of course constitute a complete bar of trial.

2. General Amnesty to Deserters, &c. An informal plea of pardon has in some cases been interposed in the military practice, where the accused has or claims to have been included in a general amnesty, offered by the President,[1] in the form of a Proclamation or General Order, to deserters or absentees.[2] Pardons, as it has repeatedly been remarked, may be conditional—based upon conditions precedent or subsequent;[3] and these amnesties have generally proceeded upon the condition precedent that the party shall return and surrender himself by a certain day, while some of them have contained the condition subsequent that he shall duly perform duty for the remainder of his term, make good the time lost by his desertion, &c. Where a pardon is granted upon a condition precedent, the pardon does not take effect till the performance of the condition: where the condition is subsequent, the failure to perform it nullifies the grant.[1]

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[1] That the pardoning power includes the power to extend amnesty, see Davies *v.* McKeefy, 5 Nev., 369; U. S. *v.* Klein, 13 Wallace, 128; Armstrong *v.* U. S., Id., 154.

[2] See Proclamations or Executive Orders of this character, (generally issued after a war,) published or referred to in the following Orders of the War Dept.: *viz.* G. O. of Nov. 5, 1811; Do. of June 17, 1814; Do. of July 8, 1815; Do. 35 of July 6, 1848; Do. 58 of March 10, 1863; Do. 35 of March 11, 1865; Do. 43 of July 3, 1866; Do. 102 of Oct. 10, 1873. [De Hart, (p. 144, note,) refers to a further proclamation of this character, as "made by the President, after the termination of the Black Hawk War in 1832, when many soldiers deserted from dread of the cholera."] The proclamations and orders of March 10, 1863, and March 11, 1865, were issued pursuant to directions of Acts of Congress. Several such proclamations were issued by Washington during the Revolutionary War. See 2 Jour. Cong., 294; G. O. Hdqrs. Army, Morristown, April 6, 1777; Do. Hdqrs., Newburg, May 12, 1782.

[3] 2 Hawk., c. 37, s. 45; 4 Black. Com., 401; *Ex parte* Wells, 18 Howard, 307; Com. *v.* Haggarty, 4 Brewst., 326; 6 Opins. At. Gen., 405; 11 Id., 229; DIGEST, 554.

3. Constructive Pardon. Where a deserter has been restored to duty without trial, under par. 128, Army Regulations, 'by the authority competent to order his trial,' this action is regarded as a constructive condonation of the offence, and may be pleaded in bar of a trial subsequently ordered.[2] So, a promotion or appointment to a new office, of an officer of the army, while under arrest and charges for the commission of a certain military offence, will operate as a constructive pardon of such offence, and constitute a valid bar to a trial therefor.[3] But the mere restoring to command or duty, or ordering on duty, of an officer or soldier, when in arrest under charges, by his commanding officer, while regarded in the English law[4] as practically a pardon and pleadable as such in bar of trial, is not authorized in our law to be so treated, (except in the single case above mentioned as provided for in the Army Regulations,) and is not so treated in practice.[5] Nor can the mere fact that charges once preferred have been dropped by a commander be pleaded in bar as a constructive pardon of the same, upon their being subsquently revived and brought to trial in connection with charges for offences since committed.[6]

II. FORM AND PROOF OF PLEA.

Form. The plea may be oral or in writing. Where the pardon is a special one, *i. e.* a formal pardon of the individual, the plea should properly be in a written form, setting forth the date of the pardon, by whom granted, and its substance, with an averment to the effect that the offence pardoned is the same with that which is the subject of the charge. If the grant is made upon a condition precedent, a compliance with the same should be alleged; if upon a condition subsequent, it should be averred that the same had been accepted. Where a pardon is claimed under a General Order or proclamation of the President, it will be sufficient to refer to the same orally or in writing, stating its date and substance or effect, with an averment that the accused belonged to the class described therein, and that he has complied with the conditions imposed thereby; as, for example, in returning, as a deserter or absentee, by the time fixed, in since rendering due service as a soldier, &c. If a constructive pardon is relied upon, the fact or facts claimed to constitute a pardon in law must be set forth—as that the accused was, by a certain order, stating its date and source, restored to duty as a deserter under par. 128 of the Army Regulations; or that, since his arrest and the preferring of the present charges, he has been, by the President, promoted to higher rank or appointed to a higher office in the army, &c.

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[1] Flavell's Case, 8 W. & S., 197; 6 Opins., 405. And see U. S. *v.* Klein, 13 Wallace, 142. "If a condition subsequent is broken, the offender could be tried and punished for the original offence. The breach of the condition would make the pardon void." 11 Opins. At. Gen., 229.

[2] DIGEST, 341–2. And see G. O. 4, Dept. of the West, 1861, where the plea was sustained in cases of soldiers, not deserters, restored to duty while under charges, in the same manner as deserters, by the Department Commander, in a General Order.

[3] 4 Opins. At. Gen., 8; 6 Id., 123; 8 Id., 237; DIGEST, 553.

[4] Simmons § 565–7; Clode, 1 M. F., 173, (citing opinions of the Duke of Wellington and Judge Advocate General Villiers, and cases of Lord Lucan, Col. Quentin, Capt. Achison, &c.) And see Prendergast, 244–5; Gorham, 28–9; Jones, 28; Twyford, 35; DIGEST, 553.

[5] DIGEST, 553; De Hart, 144; Benét, 119; Ives, 100.

[6] See case in G. C. M. O. 13 of 1871.

Proof. In connection with a plea of special pardon, the original pardon should be produced in court, since the court cannot take judicial notice of a personal grant of this character.[1] As in a case of a deed, the acceptance of the pardon will be inferred from the fact of the making of the plea, without other proof. If the pardon be conditional, the accused should show that he has duly and fully performed the condition, or has performed it as far as practicable up to the date of the plea.[2] In pleading an amnesty offered to deserters, the accused,—if the fact does not appear from the averments of the specification or is not admitted by the prosecution,—must show that his case is embraced within the terms of the offer,[1] (not being included in any excepted class, if exceptions are made,[2]) and further,—if this also does not appear from the specification or is not conceded by the prosecution,—that he surrendered himself or returned voluntarily within the time limited, and has since duly performed service, &c.[3] A copy of the Order or proclamation as published will properly be added and entered of record with the plea; but of the existence and contents of such Order, &c., the court will take judicial notice without proof. A constructive pardon will be proved by the order, issued by competent authority, restoring the party to duty as a deserter under the Army Regulations, with evidence, if necessary, of the identity of the accused with the person described in such order; or by the executive appointment or other fact or facts relied upon as constituting a legal pardon. If the accused requires time, (as he well may where his station has been changed, or he has been transferred to a distant command, &c., since the date of the alleged condonation,) in order to make profert of a special pardon, to produce or prove an order restoring him to duty, to establish his identity, &c., a reasonable continuance will in general properly be granted him for the purpose.[4]

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[1] See U. S. *v.* Wilson, 7 Peters, 161. It may be noted here that proof of a promise to pardon is not evidence of pardon: the promise being executory may be withdrawn. 11 Opins. At. Gen., 230. A variance in a pardon as to the name or description of the beneficiary may be explained by evidence. 2 Hawk., c. 37, s. 66; 2 Gabbett, 340.

[2] 6 Opins. At. Gen., 405; Simmons, *v.* 564; Griffiths, 99; Macomb, 40; O'Brien, 249; De Hart, 144.

The prosecution may take issue on the plea;—may reply that the pardon has been obtained by fraud;[5] that the accused is not identical with the person claimed to be pardoned; that he has not complied with the conditions prescribed, &c.

III. PROCEDURE UPON THE PLEA.

Upon the plea being interposed, (and the pardon, order, &c., being produced, if any,) the proper proceeding is for the judge advocate, if he has no exceptions to take, to enter, (with the authority of the convening officer,) a *nolle prosequi* upon the charge or charges covered by the pardon. If he contests the plea, it will remain for the court, upon the evidence furnished and argument made, to deliberate and pass formally upon the issue. If the plea is overruled, the accused—as in the case of the overruling of a special plea of former trial—is, regularly, called upon by the court to plead to the merits, and the trial goes on. If the plea be sustained, the court does not proceed to *acquit* the accused, since the pardon was based upon the theory of his guilt, and his acceptance of it was substantially an admission of guilt in law.[1] The court therefore merely adjudges that the plea is allowed, and terminates its proceeding in the case; the record then going to the reviewing authority, who, if he approves the action taken, will order the discharge of the prisoner.

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[1] It must appear that he was a deserter at the date of the proclamation or Order; if deserting later he could not of course be held to be included in the amnesty. G. O. 5, Dept. of the East, 1866.

[2] Patridge's Case, Cro. Eliz., 125.

[3] Simmons § 564; Griffiths, 99; Macomb, 41, De Hart, 144. In a case published in G. O. 61, Dept. of the East, 1865, the accused was held "not entitled to the benefit of the President's proclamation to deserters, as he did not voluntarily deliver himself up, but, when brought before a magistrate on a complaint for grand larceny, he then, to escape prosecution, claimed to be a soldier." And note case referred to in DIGEST, 554, § 9.

[4] 2 Hawk., c. 37, s. 65. On the subject of Continuances, see Chapter XV.

[5] 2 Hawk., c. 37, s. 46; 4 Black. Com., 400; 11 Opins. At. Gen., 229.

A pardon existing at the time of the arraignment should be *then* sought to be taken advantage of by this plea, since the benefit of it will be waived by a plea of guilty or not guilty.[2] A pardon, however, may reach an accused after the trial has been commenced on the merits; in which case the judge advocate, (no occasion appearing for raising an issue,) will, (with the sanction of the reviewing authority,) properly enter a *nolle prosequi*.[3] Indeed, as it has been remarked by Atty. Gen. Cushing,[4] the President, without resorting to a grant in the ordinary form, may practically exert the pardoning power "by order of *nolle prosequi* pending a prosecution."

IV. PROCEDURE ON SPECIAL PLEAS IN GENERAL—ORDER OF THE COMMANDER.

Where a special plea, interposed by the accused, is allowed by the court, the proceedings are, as already indicated, for the time at least terminated, and the court adjourns, the record of its action being forthwith transmitted to the reviewing authority. Such authority indeed, as remarked on the subject of the Plea to the Jurisdiction,[1] may disapprove the action of the court and *order* it to proceed with the trial. A court-martial—a mere instrumentality for the maintenance of discipline in the army—is not vested by statute with power of final disposition of a case under these circumstances, and, in the absence of such power, it is subject, in regard to its procedure, to the orders of the commander by whose order it was created.

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[1] 11 Opins. At. Gen., 228.

[2] 2 Hawk., c. 37, s. 59, 67; 4 Black. Com., 402; 2 Gabbett, 340–1; U. S. *v.* Wilson, 7 Peters, 162; Hough, 905.

[3] As to this proceeding, see Chapter XV.

[4] 8 Opins., 283, 284.

The action of a court-martial upon a special plea, motion,[2] or other interlocutory issue, where no such power is given it, cannot be allowed to be independent of the approval of the commander without authorizing insubordination or assumption in a body which would be wholly unwarranted in a separate member.

The court may thus legally be ordered by the proper superior to proceed with the trial, notwithstanding its allowance of the special plea. But before making such order the commander may well pursue the less positive course of returning the proceedings to the court for revision by it and correction of its action. Should it decline to make the proper correction, the commander should not hesitate to resort to a positive order, if due considerations of justice demand it.[3]

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[1] *Ante*, page 373.

[2] As to the procedure on Motion, see *ante*, p. 378.

[3] Such orders are believed to have been given more frequently at an earlier period than later. A precedent is found in G. O. of February 6th and 22d of 1822, where a court first directed "to reassemble for the purpose of reconsidering its proceedings," is subsequently ordered by the Secretary of War, to "proceed and try Bvt. Major Saml. Miller of the U. S. Marine Corps, upon the charges and specifications preferred by Lieut. Howle of said Corps, which charges and specifications were rejected by said court." The course held legal in the text was more recently substantially pursued in two cases in the Dept. of the Platte—that of Pvt. B. Watkins, (G. C. M. O. 62, Dept. of the Platte, 1891,) and that of Pvt. John Kitt. (Do. 58, Id., 1892.) In each case the court, having sustained a plea to the jurisdiction, its action was disapproved by the Dept. Commander and the proceedings returned for completion of the trial, which was thereupon completed accordingly, by the hearing of evidence, and, in the one case, by a formal acquittal, and, in the other, by a conviction. [These particulars are not set forth in the G. C. M. O., but appear in the records of trial.] In a naval case, published in G. C. M. O. 9, Navy Dept., 1893, the Secretary of the Navy declined to approve the exercise of a similar authority by a convening officer, on the ground of want of precedent and because he considered the power to be a "dangerous" one. There are, as we have seen, precedents in the army, and, in the opinion of author, there can be no material danger attending a resort to the power, where properly called for by the requirements of justice.

INADMISSIBLE SPECIAL PLEAS.

Besides the regular special pleas above considered, a few others, not properly admissible as separate pleas, have in some instances been offered in military cases—as follows:

Former Punishment. The plea of former punishment, *i. e.* that the accused has already been adequately punished for his offence by his commanding officer, though recognized in the English practice,[1] is not known to our military law,[2] and when made on our military trials has been properly overruled.[3] Where indeed an accused has, prior to trial, been subjected, on account of his offence, to any physical punishment, or to reduction to the ranks, or to a protracted arrest, or other unusual or unauthorized discipline, he may properly show the fact in evidence on the general issue, in mitigation of such sentence as the court, in the event of his conviction, may impose.[4] But, except in this form, he cannot avail himself of such circumstances, upon a trial.

Illegal Enlistment. The accused, upon arraignment, has sometimes pleaded that on account of some illegality in his enlistment, as that he was under age,[5] or that he was enlisted for three years when the law required that all enlistments should be for five,[6] &c., he was not amenable to trial. But no such form of special plea is recognized in our law. If the accused, by reason of an invalid enlistment, is not duly or legally in the army, he should, regularly, offer the facts in evidence under a *plea to the jurisdiction*, or bring them out under the general issue.

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[1] Simmons § 561–563; Army Act, 46, (7.)

[2] See De Hart, 145; Benét, 103. A plea of this nature, however, seems to have been recognized in the practice of our navy. See case of Lieut. Stanley in Captain Jones' Trial, p. 310; also case in G. O. 137, Navy Dept., 1869.

[3] G. O. 27, Army of the Potomac, 1861; Do. 73, Third Mil. Dist., 1868; Do. 12, Dept. of Cal., 1871; G. C. M. O. 71, Dept. of Dakota, 1882.

It has been held in a recent case in the Navy—G. C. M. O. 9, 50, Navy Dept., 1893—that a previous public reprimand of an officer by his commander was not a legal bar to his trial for the offence committed, or ground for a special plea.

[4] DIGEST, 398. And see the three last G. O. cited in the preceding note.

[5] G. O. 52, Dept. of the East, 1869.

[6] G. O. 82, Dept. of Dakota, 1869.

Release from Arrest, &c. Release from arrest upon the charges, and restoration to duty, before trial,—already noticed as not ground for a plea of pardon, (except in cases of deserters, under par. 218, Army Regulations,)—is, similarly, no ground for a special plea in bar of trial.[1]

Other Subjects. Such objections, (which have been taken in some cases,) as that the accused at the time of the arraignment is undergoing a sentence of general court-martial;[2] or that owing to the long delay in bringing him to trial he is "unable to disprove the charge or defend himself;"[3] or that he has not been furnished with a copy, or a correct copy, of the charges;[4] or that his accuser is actuated by malice or is a person of bad character,[5]—are, it need hardly be said, not proper subjects for special pleas; however much they may constitute ground for continuance, or affect the question of the measure of punishment.

So, as to all such objections as are properly matters of *defence* under the general issue,—for example, that the accused committed the offence charged when insane or intoxicated, or in obedience to a military order, or under a mistake of fact or law, &c.;—these are not within the scope or purpose of special pleas in bar, nor can they properly be raised in any interlocutory form or otherwise than upon the trial and by the testimony, being, as they are, of the very substance of the defence.

IV. PLEA OF GUILTY OR NOT GUILTY.

The accused, upon arraignment, having no special plea or pleas to offer, (or having presented a special plea or motion which has been overruled, or the sustaining of which by the court has been disapproved, and the court ordered to proceed, by the convening commander,) proceeds in regular course to plead—orally—

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[1] G. O. 7, Dept. of the Mo., 1868; Do. 32, Fifth Mil. Dist., 1868.

[2] G. O. 30, Dept. of the Pacific, 1864.

[3] G. C. M. O. 85, Dept. of the Mo., 1869. And see G. O. 33, Dept. of Arizona, 1871; also G. C. M. O. 34, Dept. of the Platte, 1893, citing this treatise.

[4] See De Hart, 147.

[5] G. O. 33, Dept. of Arizona, 1871.

Guilty or Not Guilty, as the case may be, to the several charges and specifications in their order.

Form of the Plea—Qualifications and Exceptions. The general form of this plea has already been indicated. As to this form it is laid down by the authorities that it must be "express, simple and unqualified," no statement in exculpation or justification being admissible in connection with it.[1]

But though no such matter of evidence, or other matter of explanation or embellishment, can form part of this plea, it may yet, at military law, be qualified in so far that the accused may *except* from the application of his answer of guilty or not guilty to a specification certain words or allegations indicated by him. Thus he may plead guilty to a specification except as to some averment or averments of fact, or as to a word or words expressive of the intent charged, and to this or these, not guilty; or he may plead not guilty to a specification except as to some portion which is admitted, and to this portion guilty.

Another form of qualification of this plea, is the pleading of not guilty of the charge as laid, but guilty of a *lesser offence* included and involved in it. Thus a soldier accused of desertion, but claiming that he is chargeable only with an unauthorized absence, may legally plead not guilty of the offence charged but guilty of absence-without-leave. And in so pleading he should, further, *except* from his plea of guilty such words in the specification as characterize the offence of desertion, substituting, if necessary, words describing the offence actually admitted.[2] This form of qualifying and excepting, though not essential, since the court may always find the lesser offence if the evidence warrants it, is not unfrequent in practice.

Inadmissible forms. An accused may plead guilty of the specification but not guilty of the charge, since such plea raises a legal issue, *viz.* whether the facts alleged in the specification do constitute the offence charged.[1] But the converse plea of not guilty of the specification but guilty of the charge, is wholly illegitimate. It neither confesses anything nor contests anything, but consists of two incompatible answers which nullify the issue, and cannot be admitted as pleas by the court.[2] So, the plea to a charge or specification of "*guilty but without criminality*," though sometimes admitted in practice, is irregular and contradictory and not to be sanctioned.[3] It is practically equivalent to "not guilty" and should properly be made in this form.

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[1] 4 Black. Com., 333; Adye, 158; Tytler, 239; Kennedy, 92; Simmons § 552; Maltby, 53; De Hart, 134, 135; G. O. 107, Dept. of the Mo., 1863.

[2] In such a case the plea would ordinarily be—To the Specification, Guilty, except as to the words "did desert," substituting the words *did absent himself without authority from;* to the Charge, Not Guilty, but Guilty of Absence-without-leave. Or the plea to the Specification might be—Guilty, except in so far as it alleges desertion; or Guilty, only so far as it alleges absence-without-leave.

Effect of the Plea as a Waiver. The effect of the plea of guilty or not guilty is to *waive* any defects of form in the charges and specifications, which might be taken advantage of by plea in abatement, or its substitute, a motion to strike out. By this plea, the accused admits his own identity with the person described in the charges as the offender, and foregoes objections to the same as inartificial, indefinite or redundant, &c., as well as to the allegations of particular matters of description, or of time and place, as being obscure or incomplete.[4] A substantial defect, however, going to the sufficiency of the charge as a statement of a military offence, is not waived.[5] Nor of course can any such radical defect as an illegality in the constitution of the court, or an absence of jurisdiction of the offence or the person, be done away with or lessened by this plea.[6]

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[1] This plea may sometimes be made by a soldier through ignorance when he really does not mean to admit the substance of the specification. In such a case it was remarked by the reviewing authority, in G. C. M. O. 70 of 1875—"The court should have advised him to frame his plea more intelligently."

[2] G. O. 76, Dept. of the East, 1864.

[3] In a case in G. C. M. O. 52, Dept. of the Columbia, 1881, a plea of this kind offered by the accused was refused to be received by the court, which required him to plead anew. On his then standing mute, the court directed the plea of not guilty to be entered to both charge and specification.

[4] Wharton, C. P. & P. § 413; 3 Opins. At. Gen., 549; O'Brien, 250–1; G. O. 48, Dept. of the South, 1864; Do. 10, Dept. of the Cumberland, 1867; Do. 2, Dept. of the Platte, 1871; DIGEST, 591.

[5] Fletcher *v.* State, 7 Eng., 170; DIGEST, 591.

[6] DIGEST, 326, 591. In Gen. Hull's case, (Printed Trial, p. 118,) the court, referring to the charge of "treason" preferred against the accused, expresses the opinion that a court-martial "cannot acquire

The Plea of Not Guilty—Its legal effect. This plea, which is by far the most frequent in all criminal proceedings, whether civil or military, is also known as the *general issue*, because it denies and puts at issue and to trial all the material allegations in the indictment or charge. Where a contest on the merits is proposed, this plea is an essential element of the proceedings which cannot be dispensed with. It must be made by the accused and entered of record as a starting point: in its absence the court cannot supply an issue.[1]

In law "not guilty" is not a denial by the accused of the doing of the specific acts or things set forth in the charge. He may have done none of them, while, on the other hand, he may have done all of them, and the plea be as proper in the latter case as the former. For what he denies is not the details but the commission of the legal offence which these details describe; in other words the particular offence which, it is alleged, the details constitute.[2] Thus the accused may well admit the *act* charged but not admit the *animus* ascribed to it; or he may admit the act and defend it on the ground that it was enjoined by superior authority, or compelled by an exigency of war or of the service, &c. The plea is thus a legal issue, not a moral disclaimer; it commits the party resorting to it to no falsehood or deception.[3] Even where every material averment in the charge is admitted to be true, and no defence to the same exists on the merits, this plea is always justifiable, since it is in general only through this legal form that all the circumstances surrounding the offence, and which, taken together, may very considerably extenuate its criminality, can be brought out in evidence, and the proper measure of punishment be duly determined.

The Plea of Guilty—Its legal effect. The effect in law of this plea is that of a confession of the offence or admission of the

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jurisdiction of the offence by the waiver or consent of the accused." That a plea of jurisdiction cannot confer jurisdiction where none exists in law, compare People *v.* Campbell, 4 Park., 386; Do. *v.* Rathbun, 21 Wend., 509; Shoemaker *v.* Nesbit, 2 Rawle, 201; Moore *v.* Houston, 3 S. & R., 190; Duffield *v.* Smith, Id., 599.

[1] Wharton, C. P. & P. § 409; 1 Bishop, C. P. § 801; Douglass *v.* State, 3 Wis., 821.

[2] See Kennedy, 93.

[3] Kennedy, 93; Com. *v.* Battis, 1 Mass., 94.

act *as charged.* But it is to be noted that such plea does not necessarily confess that a particular legal offence has been committed, for it admits only what is charged. If the alleged offence indeed is duly set forth in the charge, such offence is confessed by this plea, and a formal conviction of the same must follow.[1] If not duly set forth,—if the facts stated in the specification fall short of constituting the particular offence,—there is no such confession by the plea of guilty and the accused cannot legally be convicted.[2] Nor can such plea confer jurisdiction where not given by law.[3]

Reception of this Plea—Withdrawal. This plea is one which military courts, in common with civil, should not too readily receive,[4] and which, (as has already been remarked,) a judge advocate should not attempt to induce to be made. Where there is reason to suppose that such plea is not both voluntary and intelligent, or that the accused does not appreciate its legal effect, or is misled as to its influence upon the judgment of the court, he should be advised by the court not to interpose it but to plead instead "not guilty." So, where, after it has been duly made and received, the accused asks to be allowed to withdraw it and substitute the general issue, he should ordinarily be permitted to do so:[5] indeed the *court* will properly advise or suggest such substitution if the same appears to be in the interests of justice.

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[1] 1 Bishop, C. P. § 795. This is "the highest kind of conviction of which the case admits." 1 Chitty, C. L., 428–9.

[2] Wharton, C. P. & P. § 413; 1 Bishop, C. P. § 795; Fletcher *v.* State, 7 Eng., 170. Where the charge is defective in that the offence is laid under the wrong Article of war, "the plea of guilty cannot enlarge the power of the court." G. C. M. O. 32, Dept. of the Mo., 1871. In G. C. M. O. 79 (H. A.) of 1891, is an instance of a plea of—"*Not Guilty, by advice of counsel.*"

[3] As—in a civil case—neither silence nor consent of parties will supply a jurisdiction not given by the existing law. Indiana *v.* Tolleston Club, 53 Fed., 18.

[4] 4 Black. Com., 329; 2 Gabbett, 319; 1 Bishop, C. P. § 795; Tytler, 237; Kennedy, 86; De Hart, 136.

[5] 1 Bishop, C. P. § 798; Wharton, C. P. & P. § 414; 2 Gabbett, 319; Tytler, 237; Hough, (P.) 780; State *v.* Cotton, 4 Fost., 143; People *v.* McCrory, 41 Cal., 458; DIGEST, 590. So, the court may in its discretion permit the plea of not guilty to be withdrawn and that of guilty, or a special plea, to be substituted. 1 Chitty, C. L., 423; 1 Bishop, C. P. § 801.

This Plea in connection with an Inconsistent "Statement." For the action last indicated there is especial reason where the accused, upon his plea of guilty, proceeds, as has often been done by enlisted men ignorant of the legal effect of the course pursued, to make to the court a "statement" setting forth facts quite inconsistent with such plea. Thus, a soldier, after having pleaded guilty to a charge of desertion, will sometimes, in a final address to the court, state facts going to show that his unauthorized absence was unaccompanied by the *animus* peculiar to desertion; or, where the charge is larceny, that his unauthorized taking of the property was not characterized by an *animus furandi;* or, in any case, that he was drunk and ignorant of what he was doing. So, he may claim in his statement that he committed the act charged while temporarily insane.[1] In such cases, while the representation made is often a mere pretence, the fair inference may not unfrequently be that it is the statement which is accurate and intelligent rather than the plea, and that the accused has really a good defence to the charge, or is guilty only of a minor offence included in it. In other cases, the statement, while not strictly inconsistent with the plea, will set forth matters of extenuation which, if established in evidence, will very materially palliate the offence admitted by the plea. In all such cases the court, if it has reason to believe that the statement is made in good faith, will in general properly advise the accused to withdraw his plea of guilty, substituting a plea of not guilty. Upon this being done, or if the plea remains as made, the court will properly call upon the judge advocate to introduce such evidence as may be readily available for investigating the facts stated by the accused, with a view to ascertaining the exact offence committed and the amount of criminality to be attached to it. Such was the opinion and advice of Judge Advocate General Holt in repeated cases of soldiers brought to trial during and since the late war,[2] and his view was adopted in Orders by the Secretary of War.[3] It has also been cited and followed in numerous cases by commanders of military departments, &c., by whom the proceedings of courts-martial, by which such action was neglected to be taken, were frequently disapproved.[1]

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[1] See case in G. C. M. O. 16, Dept. of the Columbia, 1892.

[2] DIGEST, 588–9.

[3] In the cases of two soldiers published in G. C. M. O. 2, of 1872, in which the written statements submitted by the accused were contradictory of their pleas of guilty, it was remarked by the Secretary of War as follows: "The Court should have regarded these statements as neutralizing the effect of their pleas, and should have had the accused

Introduction of Evidence with the Plea of Guilty in general. But, *in general also*, and where the plea is intelligently made, the same, though a confession of the offence as charged, is held by the weight of authority not to preclude the introduction of evidence to exhibit the full facts of the case. While it was no doubt the practice formerly, as it is now in the majority of cases in which this plea is interposed, not to take any evidence whatever, the fact that *some* evidence was necessary to a comprehension of a considerable proportion of such cases seems to have been appreciated at an early period. Thus in a General Order from Army Headquarters—No. 60 of 1829[2]—it was enjoined, by the General Commanding, upon courts-martial in capital cases, and especially cases of desertion, not to receive the plea

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instructed as to their legal rights, and advised to change their pleas with a view to the hearing of testimony. It not unfrequently happens that soldiers do not understand the legal difference between absence-without-leave and desertion, or are wholly unable to discriminate as to the grade of their offences, as determined by their motives. They thus, sometimes, ignorantly plead guilty and are sentenced for crimes of which they may be actually innocent. The proceedings, findings, and sentences are disapproved." And see G. C. M. O. 31, 1876; also Do. 63, 1874; Do. 91 of 1881. A similar view has now been adopted into the English law. See Rules of Procedure, 36 (A.)

[1] See G. O. 34, Northern Dept., 1865; Do. 33, Dept. of the Ohio, 1866; Do. 46, Dept. of the South, 1868; Do. 7, Id., 1869; Do. 22, Id., 1871; Do. 22, 71, Id., 1873; Do. 28, Dept. of the Platte, 1869; Do. 39, Id., 1870; Do. 2, 24, 68, Id., 1871; Do. 88, Dept. of Texas, 1870; Do. 19, 33, 38, Id., 1873; Do. 11, 16, 18, Id., 1874; Do. 45, Id., 1875; G. C. M. O. 18, 23, Id., 1891, Do. 22, Id., 1893; Do. 98, Dept. of the East, 1872; Do. 14, 43, 68, Id., 1873; Do. 81, 83, 98, Dept. of Dakota, 1873; Do. 8, Id., 1876; Do. 31, Dept. of Cal., 1872; Do. 55, Id., 1874, Do. 5, 74, Dept. of the Mo., 1875; Do. 61, Id., 1876; Do. 77, 80, Id., 1881; Do. 18, Id., 1893; Do. 29, Div. of the Atlantic, 1874; Do. 23, Id., 1875; Do. 68, Id., 1888; Do. 144, Div. of Pacific & Dept. of Cal., 1880; Do. 1, Dept. of Dakota, 1885; also Do. 69, Hdqrs. of Army, 1877, (remarks of Gen. Hancock.) The instances referred to in these Orders, while mostly cases of desertion, include also cases of larceny and of drunkenness on duty.

[2] This ruling was preceded by that of the court in the case of Capt. Barron of the Navy in 1822, where it was held that the plea of guilty of the accused should "not prevent the introduction of any testimony which the court may deem it necessary to hear on the part of the prosecution."

of guilty, but, entering for the prisoner the plea of not guilty, to "determine the grade of the offence and *quantum* of guilt by the character of the evidence produced to them." Next, in a General Order, No. 23 of 1830, it was declared by the same authority that:—"In every case in which a prisoner pleads guilty, it is the duty of the court-martial, notwithstanding, to receive and to report in its proceedings such evidence as may afford a full knowledge of the circumstances; it being essential that the facts and particulars should be known to those whose duty it is to report on the case, or who have discretion in carrying the sentence into effect." Later, in No. 21 of the Orders of 1833, the General Commanding, in remarking that the old rule, that no evidence should be received with the plea of guilty, had been abrogated by recent Orders, disapproves the action of a certain court-martial in disregarding the same and refusing to allow the judge advocate to show, notwithstanding such plea, the facts and circumstances of the case, which—it is declared—are essential both to the reviewing officer and to the President as the pardoning power. Still later, in G. O. 36 of 1835, another court-martial is pointedly censured for a similar disregard of Orders and of the opinion of the Attorney General. This was an opinion of Atty. Gen. Butler, in the case of Cadet Crittenden, addressed to the Secretary of War on April 11, 1834,[1] "in answer to questions proposed upon a statement prepared by Gen. Macomb." It is here held that—"it is the duty of a court-martial in all cases where the punishment of the offence charged is discretionary, * * * and the specifications do not show all the circumstances attending the offence, to receive such testimony as the judge advocate may offer for the purpose of illustrating the actual degree of the offence, notwithstanding the party accused may have pleaded guilty. * * * If there be any exception to this remark, it is where the specification is so full and precise as to disclose all the circumstances of mitigation or aggravation which accompanied the offence. Where that is the case, or where the punishment is fixed, and no discretion is allowed, explanatory testimony cannot be needed." This opinion was incorporated in par. 31 of Art. 35 of the issue of the Army Regulations of December, 1836. In the Regulations of 1841, the opinion, condensed to a few lines, and limited to "cases of enlisted soldiers," is published as par. 228;

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[1] Published in 2 Opins. At. Gen., 636; also in G. O. 32 of 1834

and the same paragraph, (numbered 320,) is repeated in the issue of 1847. It does not appear in the Regulations of 1857 nor thereafter. Revived during the late war, attention was frequently called to this principle by the Judge Advocate General, who held that a court-martial was authorized, notwithstanding the plea of guilty, and even where the sentence was not discretionary,[1] to receive evidence on the merits, with a view to determining the actual criminality of the offender and the measure of punishment which should properly be executed, in any case in which such evidence was deemed to be essential to the due administration of military justice. And this even against the objection of the accused, who "could not properly be allowed, by pleading guilty, to shut out testimony where the interests of the public service required its introduction." Of course, where evidence was thus admitted, the accused was to be afforded the opportunity of offering rebutting evidence, the testimony on both sides being governed by the usual rules in regard to relevancy, &c.[2] These views have been adopted and acted upon in repeated cases published in Department, &c., Orders,[3] and—especially as relating to cases of desertion to which they are peculiarly applicable—have been announced in a G. O. of the War Department,[4]

With the plea of Not Guilty or Guilty begins the Trial proper,[5] which we now proceed to consider.

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[1] See G. C. M. O. 37, Dept. of the Mo., 1880, where it is observed by Gen. Pope:—"While the punishment may be fixed, yet testimony is necessary and proper for the consideration of the Reviewing Officer, who may, under the powers conferred upon him by law, pardon or mitigate the punishment."

[2] DIGEST, 587.

[3] See G. O. 54, Army of the Potomac, 1861; Do. 91, Id., 1863; Do. 57, Dept. of Washington, 1863; Do. 20, Northern Dept., 1865; Do. 33, Dept. of the N. West, 1864; Do. 52, 58, 91, Dept. of Arkansas, 1864; Do. 24, Dept. of Va., 1865; Do. 81, 114, Dept. of the Mo., 1867; Do. 39, Dept. of the Platte, 1870; Do. 45, Third Mil. Dist., 1868; Do. 42, Fifth Id., 1867; G. C. M. O. 72, Dept. of the Platte, 1887; Do. 1, Dept. of Dakota, 1888. And see Simmons § 553, 1005; Tytler, 238; Macomb, 38–9; De Hart, 135. The contrary view, that, where the accused pleads guilty, no evidence can be introduced against his objection, is expressed by O'Brien, 250, 251. And see Benét, 95.

[4] G. C. M. O. 69 of 1877.

[5] The *trial* begins "when the jury is charged with the prisoner. Previous to this everything that is done is merely preliminary." McFadden *v.* Com., 23 Pa. St., 12.

CHAPTER XVII.

THE TRIAL.

SUPPOSING all preliminary objections, motions, and special pleas, if any, to have been disposed of, and the accused to have pleaded "not guilty" to at least a portion of the charges and specifications,—all is now prepared for the Trial on the merits; and this subject will be considered in the present Chapter under the following heads:—I. The hours of session of the court; II. The Opening of the prosecution or defence; III. The general course of proceeding; IV. The Defence; V. The concluding Statement; VI. Contempts. The important subject of EVIDENCE will be presented in a separate Chapter.

I. THE HOURS OF SESSION OF THE COURT.

The Law on the Subject. This subject is regulated by Art. 94 of the code, as follows:—"*Proceedings of trials shall be carried on only between the hours of eight in the morning and three in the afternoon, excepting in cases which, in the opinion of the officer appointing the court, require immediate example.*"

Purpose of the Article. The object of this statute, which dates in our law from the Articles of 1775, and is but a modified form of a similar provision in the first Mutiny Act, is, as explained by military writers,[1] to prevent the daily attendance upon the trial from being too protracted and onerous, to obviate hasty action on the part of the court, and to afford an opportunity to the judge advocate to write up the daily record. In an opinion of an Attorney General,[2] it is represented as a purpose of the Article, "to guard against improper secrecy," *i. e.*, by precluding courts-martial from sitting during hours when their proceedings would not readily be subject to public scrutiny.

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[1] Hough, 377; Coppée, 50.

[2] 11 Opins., 141.

Its Legal Effect. The provision of the Article, being confined to "proceedings of trials," is not to be extended to action taken by the court which is not properly a part of the trial. Thus it has been held that the fact that a court entertained a *motion to adjourn* after three o'clock p. m. did not constitute a violation on its part of the injunction of the statute.[1] As a rule of procedure on the *trial*, however, the injunction is invariable.[2] While a court is not *required* to sit during the entire period between the hours specified, and may, on any day of its sessions, open later than eight o'clock a. m., or close earlier than three o'clock p. m., yet in the absence of the specific authority indicated in the last clause, it cannot properly sit outside of the designated limits, and, if it does so, its proceedings, while not, in the opinion of the author, legally invalidated, the provision being regarded as directory only,[3] are necessarily irregular, and the members of the court are amenable to justice for a disregard of the statutory direction:[4] their proceedings and sentences also are liable to be formally disapproved by the reviewing officer, if the objection is deemed sufficiently material.[5] Strictly indeed, in the author's opinion, it is only those portions of the testimony or proceedings of trials which are had without the hours named that can be affected, and if such testimony or proceedings can afterwards be repeated and gone through with *de novo*, within the proper hours, the defect in the action of the court may be remedied.[1] It is also only where the record shows affirmatively that the legal hours were disregarded by the court that the proceedings are, so far forth, to be treated as irregular and liable to disapproval.[2] It is not *required* in the Article or elsewhere that the record shall specifically set forth the hours of assembling and adjournment, and where none are stated, it will properly be presumed, in favor of the official record, (in the absence of clear proof to the contrary,) that the injunction of the Article has been duly observed by the court.[3]

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[1] DIGEST, 111.

[2] Hough, 377; DIGEST, 110. Hough, (p. 378,) observes: "All officers are supposed to regulate their watches by the time of headquarters, and by such should a court, I apprehend, be regulated in their proceedings." The uncompleted proceeding, whatever its nature, should be at once interrupted at the fixed hour. Thus Hough, (p. 192,) notes a case where—"three o'clock striking, the court adjourned in the midst of its deliberations," (on the *sentence*.)

[3] It has indeed been ruled in Orders, (G. C. M. O. 66 of 1890,) in a case in which a general court martial, convened at West Point, "conducted its proceedings in part" after 3 p. m., without express authority, that its proceedings were rendered "null and void." With such ruling the author is unable to concur. It may be added that in this case it was recommended by the Acting Judge Advocate General that the error be corrected by reconvening the court and "continuing the trial from the point arrived at at 3 p. m." But this course was not taken.

[4] Hough, (p. 386,) cites a case of a convening and reviewing officer convicted upon charges of permitting a court-martial to carry on its proceedings after 3 p. m., and of approving and executing a sentence then adjudged; and sentenced to be reprimanded.

[5] See cases of such disapproval in G. O. 2, Dept of the South, 1873; Do. 94, Dept. of the Gulf, 1864; S. O., 281; Dept. of Washington, 1861.

Excepted Cases. The Article, in its last clause, in excepting from its general operation, "*cases which, in the opinion of the officer appointing the court, require immediate example,*" confers upon such officer a discretion similar to that vested in him by Arts. 75 and 79, for fixing the number and rank of the members.[4] The exception may be said to refer mainly to cases where, by reason of some such condition as the pressure of business upon the court or of other duties upon the members, the need of prompt discipline in the command, the gravity or peculiar circumstances of the offence or offences to be tried, or the exigencies of war or of the service, it is deemed desirable that the proceedings should be especially expedited. The term "*immediate example*" has been variously construed by convening officers—by some quite strictly and by others much more freely. As all cases of military offences, referred after due investigation to courts-martial for trial, may be said in a general sense to require immediate example, *i. e.* to call for as speedy justice as can reasonably be administered, a broad interpretation of the term employed and liberal use of the discretion reposed by the Article are believed by the author to be in general justified. No case is known to have occurred in our service where the abuse, to the prejudice of the accused or of justice, of such discretion, has been made the occasion of a military charge.

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[1] Compare case cited by Hough, 378; Id., (P.) 31, 787; Hughes, 168.

[2] DIGEST, 110, 111.

[3] As to the presumption in favor of the regularity of judicial proceedings, see 1 Greenl. Ev. § 19.

[4] See De Hart, 42.

Form of Authorizing Disregard of stated Hours. As to the *form* for the exercise of the discretion, and for authorizing the court to commence or continue its daily proceedings independently of the general restriction of the Article—this, in our service, is almost invariably given in one particular mode, *viz.* by a direction added in the convening order, or in a subsequent order issued pending the trial,[1] (for the authority may be given at any stage at which an occasion for it may be deemed to have arisen,) that "the court will sit without regard to hours," or "is authorized to sit without regard to hours," or in words to such effect.[2]

A Provision liable to Objection. Whether this Article has not proved rather embarrassing than advantageous in practice is a question which has been considerably discussed. In the report of the Committee on the Judiciary of the Senate, of February 18, 1885, heretofore cited, it is observed as follows:—"The committee also thinks that it will be expedient to amend Article 94 of the Articles of war, so as to provide that the court-martial shall have power to regulate the time and duration of its daily sittings." No amendment, however, has yet been made. In the opinion of the author, this antiquated provision interposes an artificial obstruction to the efficiency and convenience of military administration which it is time should be done away with. The more rational rule of the British military code authorizes courts-martial to sit between the hours of 6 a. m. and 6 p. m., and later than 6 p. m., if the court considers it necessary.[3]

II. THE OPENING OF THE PROSECUTION OR DEFENCE.

This proceeding, by which the introduction of the testimony may be prefaced, is not common in our practice, and openings are even more rarely made by the accused than by the prosecution. An opening is indeed much less called for before a court-martial, where the proceedings are in general simple and summary, than before a civil jury. In complicated cases, however, as where there are numerous charges or specifications, or where accounts or money transactions are to be inquired into, it may be of considerable advantage, both to the parties and the court, for the judge advocate, prior to entering upon the evidence for the prosecution, to present, orally, or by reading from a writing, a brief statement of the testimony proposed to be offered to establish the several charges and of the principles of law deemed applicable to the case. In so doing, he may read from law books, published legal opinions, &c. He will properly be careful not to misrepresent the evidence—stating only what facts can be proved—and especially not to attempt to create in advance an unfair impression against the accused. Argument also is out of place here and should be postponed till the final address. Subject to these restrictions, a clear and compact statement of the facts and the law, on the part of the prosecution, by rendering the issues intelligible from the outset, may materially simplify and facilitate the investigation and contribute to the exclusion of collateral and irrelevant matter, and an opening of this character would be advised in all cases of difficulty and importance. And so of an opening on the part of the accused, where the defence promises to be an elaborate one, involving the examination of numerous witnesses or an extended discussion of points of law.[1]

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[1] See the order issued toward the conclusion of Gen. F. J. Porter's trial, (in time of war, 1862–3,) for the purpose of expediting the proceedings. Printed Trial, p. 209.

[2] G. O. 9 of 1892 now directs in terms—"Whenever a court-martial is ordered to sit without regard to hours, the order must state that it is necessary for the sake of immediate example."

[3] Rules of Procedure, 63; Story, 24.

III. THE GENERAL COURSE OF PROCEEDING.

Separation and Exclusion of Witnesses. In order to guard against collusion between witnesses, as well as the unconscious coloring of his testimony to which a witness is liable in listening to the statements of previous witnesses as to the same part of the case, it is the usage upon military as upon civil trials to separate the witnesses by excluding from the court-room at the outset of the trial all except the one about to testify, and subsequently permitting only those to be present who have fully given their evidence. The judge advocate, at the beginning, generally and properly, notifies the witnesses present to remain in an anteroom or outside the court-room, to await being called in, each in his turn. When this has not been done, the President, as the organ of the court, will ordinarily preface the hearing by a similar direction. Where the precaution has been omitted, either party may, at this or a later stage, bring the fact, that witnesses who have not yet been examined are present, to the attention of the court, which will thereupon properly order them to withdraw. The rule of exclusion should embrace *all* the witnesses, and not merely those of the party whose side of the case is about to be presented. It should be enforced by the court, (upon its own motion or at the instance of either party,) at all stages of the trial, so that any witness or witnesses yet to testify, who may be discovered to have come into the court-room, through ignorance or disregard of the preliminary direction, may be at once sent out.

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[1] On the subject of the Opening, see 1 Bishop, C. P. § 967–972; U. S. *v.* Mingo, 2 Curtis, 1; Simmons § 570; O'Brien, 252; De Hart, 149. Openings for the defence appear more frequently in the early cases. See, for example, Trial of Lt. Col. Bache, p. 24. A later instance of an extended opening is to be found in the Trial of Capt. Hurtt, p. 158.

In civil cases the witnesses are sometimes also cautioned by the court not to converse together or with other persons upon the subject of their testimony. By military courts a direction to this effect is rarely given, but in a case of importance, which had excited public interest and become matter of common talk, such a warning would not be out of place.

The rule of exclusion, it may be added, has been extended, in the civil practice, to cases where, at the trial, a discussion has arisen upon the testimony or proposed testimony of a witness under examination. Here, on motion of either party, a court-martial, like a civil court, will, ordinarily and properly, cause the witness to withdraw pending the argument.

It may also be noted that a witness who, having been examined, is proposed to be re-examined at a subsequent stage, or to be called as a witness by the other side, will properly be directed to remain out of the hearing of the other witnesses till again called in; the rule properly applying to all witnesses who have not been finally discharged as such.

If a witness, though notified to retire, has remained in court during the examination of a previous witness, while he may—if a military person—be amenable to a charge under Art. 62, he is not disqualified from testifying; his credibility only, not his competency, being affected.

To the general rule of exclusion certain classes of witnesses have been recognized as exceptions. These are those summoned as *experts*, who must often necessarily hear the evidence which precedes their own as a basis for forming their opinions; those called to testify as to *character* only; and further any person intended to be used as a witness who may be present in the capacity of a *member of the court*, *judge advocate*, or *counsel*. The *prosecuting witness*, if any, is generally permitted to remain in court, but not till after he has himself fully testified.[1]

Introduction and Hearing of the Testimony. The judge advocate now proceeds to introduce and examine his witnesses, subject to cross-examination on the part of the accused, and also to offer such depositions and written evidence as he may have to exhibit, and having completed his showing he announces that the prosecution rests. The examination should be conducted in the form of separate questions separately responded to, and not, as has sometimes been done, by reading the specification to the witness and asking him what he knows in regard to its allegations.[2] The prosecution having closed its examination in chief, the accused then produces similarly the proofs on his side and similarly rests in conclusion. Evidence in rebuttal may follow on the part of the prosecution, and this, in the discretion of the court, may be succeeded on the part of the accused by evidence in reply to the same.

The hearing cannot legally be interrupted except by a *nolle prosequi* or a dissolution, ordered by the proper superior.

Qualifying of witnesses. The witnesses, standing with uplifted hand, qualify by taking in open court[1] the form of oath (or affirmation) prescribed in Art. 92. A witness, though he be recalled, or after testifying for one side be required to testify anew and in chief for the other, is never sworn but once, *viz.* when he first takes the stand. The Article fails to indicate by whom the oath shall be administered,[2] but, according to the established usage of our service, the witnesses are sworn by the judge advocate, who is now also specially authorized to perform this function by the Act of July 27, 1892. The judge advocate, when himself appearing as a witness, is sworn, according to usage, by the president of the court. In view of the mandatory injunction of the Article, the form of the oath may not be departed from; but the witness may accompany the form by such additional ceremony as is habitual with persons of his religious sect. Thus Roman Catholics are usually sworn on a copy of the Evangelists, with a cross impressed upon or affixed to it, which is kissed by the witness. Jews are sworn by the five books of Moses, and in being qualified wear their hats. Chinese are believed to be now more commonly sworn, not by the breaking of a saucer,[3] or burning of a joss-stick, but by the usual form of oath, administered through the medium of an interpreter who explains it to the witness; and Indian witnesses have been sworn in a similar manner. A deaf and dumb witness, (having sufficient intelligence to comprehend the obligation,) is sworn through an interpreter.[4]

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[1] On the subject of this title see 1 Greenl. Ev. § 432; 1 Bishop, C. P. § 1188–1193; U. S. *v.* Cole, 5 McLean, 529; State *v.* Zellers, 2 Halst., 225; Com. *v.* Hersey, 2 Allen, 176, McLean *v.* State, 16 Ala., 672; Thomas *v.* State, 27 Ga., 288; Southey *v.* Nash, 7 C. & P., 632; Regina *v.* Murphy, 8 Id., 297; Gen. Whitelocke's Trial, vol. I, p. 2; Adml. Byng's Trial, p. 7; Simmons § 569, 942, 943; Tytler, 249; O'Brien, 203; De Hart, 148.

That a court was in error where it refused the request of the judge advocate, that the prosecuting witness should be allowed, after testifying, to remain in court, was properly held by Gen. Miles, in G. C. M. O. 20, Dept. of the East, 1894.

[2] See G. C. M. O. 38, Dept. of Dakota, 1892; O'Dowd, 10.

Order and sequence of testimony. Subject to the distinction of the several stages of the Examination—the Direct, Cross, and Re-direct examinations—which are properly to be kept clearly apart, the court will in general leave it to the parties—judge advocate and accused—to introduce their witnesses, and written testimony, in such sequence as may be found by them most advantageous or convenient. Further, in its discretion and in the interests of truth and justice, the court may permit material evidence to be introduced by a party quite out of its regular order and place. Thus it may not only admit evidence at a later period of an examination which should regularly have been introduced at an earlier, allowing a witness to be recalled for direct or cross examination upon a question or questions inadvertently omitted;[1] but it may permit a case once closed on the part of the prosecution or defence, or on both sides, to be reopened for the introduction of testimony previously omitted or discovered since the closing.[2] Even where the party is chargeable with *laches* in not offering the testimony at the proper time, the court may still permit its subsequent introduction if of so material a character that its exclusion will leave the investigation incomplete. But where new testimony is thus admitted, it must be admitted subject to the right of the other party to cross-examine and rebut.[3]

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[1] See G. O. 1, Div. of the Pacific, 1866, where the swearing and examining of one of the witnesses out of court, and in the absence of the accused, is commented upon as an illegal proceeding.

[2] The similar form of oath prescribed by the first Mutiny Act was specifically authorized and directed to be administered by the "Judge Advocate or his Deputy." The Articles of 1776 provided that the oath be administered by the president; those of 1786 that it be administered "by the court." The present form of the statute dates from the Article of 1806 which was silent as to this particular.

[3] This was the form observed in the reported case of Regina *v.* Entrehman, 1 C. & M., 248.

[4] 1 Greenl. Ev. § 366.

Examination by the court. While it is no part of the province of the court to conduct either the prosecution or the defence, it is open to any member to put questions to the witnesses for either side. But this, though it may be done at any stage of a protracted examination where some matter, which may be forgotten if not noticed at the moment, has not been made quite clear by the witness, is in general postponed until both the parties have concluded their examinations, and is then resorted to for the purpose only or mainly of the elucidation of some part of the testimony which has been left obscure.[1] A member may also suggest a question to be put by the judge advocate or accused where he has omitted to elicit some material particular. Further, while the court cannot legally "originate" evidence,[2] *i. e.* take the initiative in providing any part of the proofs, yet where, with a view to a more thorough investigation of the case, it desires to hear certain evidence not introduced by either party, it may properly call upon the judge advocate to procure the same if practicable, adjourning for a reasonable period to allow time for the purpose. New testimony thus elicited must of course be received subject to cross examination and rebuttal by the party to whom it is adverse.[3]

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[1] See 1 Bishop, C. P. § 966, and cases cited; People *v.* Keith, 50 Cal., 137; Simmons § 580; De Hart, 159; G. C. M. O. 47, Dept. of Texas, 1872. The court may induce the recalling of a witness for its own information. De Hart, 174.

[2] 1 Bishop, C. P. § 966; R. R. Co. *v.* Steinburg, 17 Mich., 99; Eberhart *v.* State, 47 Ga., 598; Lang *v.* Waters, 47 Ala., 625. Compare Lieut. Gen. Sir John Mordaunt's Case. Simmons, 383, note. In the leading case, at which the author officiated as judge advocate, of B. G. Harris, (see Printed Trial,) the defence was permitted to introduce new evidence after both sides had formally closed and the court had adjourned for two days to give the accused time to prepare his argument. In several military cases evidence has been admitted even after the reading of the final statement of the accused. See G. O. 31, Dept. of Fla., 1865; Do. 11, Dept. of La., 1869; Do. 149, Dept. of the Mo., 1870; G. C. M. O. 143, Div. Pacific & Dept. of Cal., 1880. On Lieut. Hyder's Trial, (p. 141,) evidence was held admissible, in the discretion of the court, after both addresses had been made. Evidence, however, which, though material, is merely *cumulative*, should not thus be admitted.

[3] See cases in G. O. 73 of 1829; Do. 31, Dept. of Fla., 1865; Do. 11, Dept. of La., 1869; Do. 149, Dept. of the Mo., 1870—where the action of the court in refusing this right to the accused is disapproved.

The testimony to be in open court. All testimony, whether oral or written, and whether upon the main or an interlocutory issue, is to be introduced in open court, and no testimony can be received by the court during a period of deliberation after it has been cleared.[1] So, where a member of the court has knowledge of material facts in the case, he cannot properly communicate the same privately to the court when cleared for deliberation, or to the other members, but should cause himself to be sworn as a witness on the part of the prosecution or defence.

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[1] Simmons § 577; O'Brien, 253; De Hart, 157; Lieut. Hyder's Trial, 143; Gen. Dyer's Court of Inquiry, Part I, 269; G. O. 21, Dept. of the Platte, 1866.

[2] De Hart, 85; G. O. 11, 17, Dept. of La., 1869.

[3] See G. C. M. O. 48, Div. Pacific & Dept. of Cal., 1880.

It may be noted here that the "*confronting*" of witnesses, or the causing by the court of two witnesses who contradict each other to be brought into court together and subjected to further interrogatories with a view to reconcile their statements, has been referred to as allowable by some authorities. (See Simmons § 944; De Hart, 152; Coppée, 75.) It is however a measure of very doubtful expediency, now most rarely if ever resorted to. It was refused to be permitted by the court when proposed by the accused on Lieut. Col. Fremont's Trial—pp. 321–325.

Art. VI of the Amendments to the Constitution, which declares that "the accused shall enjoy the right * * * to be confronted with the witnesses against him," has reference only to criminal cases in the federal civil courts and thus no application to trials by courts-martial. See DIGEST—WITNESS § 10, p. 752. Compare note 2, page 241, ***ante.***

To the rule that the testimony shall be taken in open court, an exception has been recognized in a case where a material witness, commorant at the station at which the court is assembled, is unable, through sickness or other disability, to attend, and the exigencies or interests of the service do not justify waiting for his recovery. In such a case the court may temporarily adjourn to the quarters or hospital where the witness may be, and receive the testimony, taken in the usual manner.[2]

The completing of the testimony not to be interfered with. After the testimony has been entered upon, it cannot, if material, properly be allowed to be interrupted, except of course through action of the superior authority which created the court, in the form of an order dissolving it or suspending the proceedings, or through the authorized entry of a *nolle prosequi.*[3] The court itself cannot refuse to hear witnesses proposed to be offered by either party, provided they are competent and their testimony is material[4] and not unreasonably cumulative;[5] nor can a party, by any act or objection, shut off the exhibition by the other party of evidence pertinent to the proof of his case. Even an accused, by escaping from legal custody, after pleading not guilty, and thenceforth absenting himself from the court, does not put an end to the trial, but the same may proceed and the prosecution be completed without regard to his absence.[1]

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[1] See 3 Opins. At. Gen., 546; also G. O. 1, Div. of the Pacific, 1866.

[2] In such a case the testimony must be taken by the court, *i. e.* as a whole; it cannot depute a member or members for the purpose. Adye, 205; Tytler, 306.

[3] See U. S. *v.* Corrie, 23 Law Rep., 145. As to the proceeding of *nolle prosequi*, or withdrawal of a charge, see Chapter XVI.

[4] See the leading case of Emerson Etheridge in G. O. 34, Div. of the Tenn., 1865; also G. O. 21 of 1872; Do. 31, Sixteenth Army Corps, 1863; Do. 20, Dept. of the South, 1871; also G. O. 59, Dept. of Dakota, 1871, where the court is censured for not waiting a reasonable time for material *documentary* evidence which had been sent for, but proceeding to judgment with unreasonable haste and thus prejudicing the interests of justice. And see G. C. M. O. 41, Div. of the Atlantic, 1886.

[5] As to the authority of the court to limit the extent of testimony as to *character*, see next Chapter.

The Reading of the Proceedings. A customary part of the routine of a trial is the reading, at the opening of each day's session, of the proceedings and testimony of the previous day, as recorded. At this reading the accused is entitled to be present, but he may waive the right:[2] with his concurrence also a reading may be dispensed with.

Objections—Clearing the Court. Objections, based upon grounds to be indicated in the next Chapter,[3] may be taken by either party to proposed oral testimony—questions or answers—in the course of the examination of the witnesses, as also to the admission of written evidence. Objections may also be raised by members of the court; but, as remarked in a General Order,[4] inasmuch as the members occupy the position of judges and not of counsel, and "it is no part of their business to try the case as counsel, the frequent interposition of objections by members is a vicious practice and should be discountenanced."

It has been sometimes asserted that a *party* could not properly object to a question put by a member; but if such a question is one not sanctioned by the law of evidence, no sufficient reason is perceived why an exception taken thereto in a respectful manner should not be entertained and allowed, as in a case of a similar question by an adverse party, and this is the view sustained by the weight of authority.[5]

All objections should be *specific*;[6] an objection expressed in general terms only, (as where the party simply says—"I object," without adding his ground,) should not be entertained by the court.

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[1] DIGEST, 318. See Chapter XIX.

[2] DIGEST, 335; G. O. 35 of 1867.

[3] The ground of the objection should be one recognized at law—as that the question is irrelevant or leading, or that the answer is not responsive, or is an expression of opinion, &c. An objection by a judge advocate to a question, that it was "unnecessary," was condemned in G. O. 42, Dept. of the Platte, 1871.

[4] G. C. M. O. 142, Dept. of Dakota, 1881, also cited in Chapter XII.

[5] A party may object to a question put by a member before "the collective opinion of the court" has been expressed upon it. Simmons § 575; DeHart, 156.

[6] Grounds for objection on the part of the prosecution or a member should be specified in court in the presence of the accused, not left to be stated after the court is cleared. G. C. M. O. 9, Dept. of the East, 1871.

To determine whether an objection is or not valid,[1] the court usually *clears*, but objections of an unimportant character may be disposed of without this formality. The "clearing" of the court in our practice is the same in form whether the purpose be to deliberate upon a special plea or motion, upon an objection to evidence, or upon the finding and sentence. A clearing may also be resorted to at the instance of the president or on the motion or at the request of a member, when the ruling of the court is desired upon any question suggested in the course of the proceedings though not raised by a party to the trial. In all cases the clearing is effected by the president of the court directing all persons (including now the judge advocate) to withdraw from the court-room and remain excluded till the doors are again opened. Our procedure, by reason of the inconvenience and embarrassment caused to the accused, counsel, clerks and reporters, witnesses and the public, is subject to serious objection. In the French *conseils de guerre* , the members when desiring to deliberate,[2] themselves retire to a separate room, leaving the officials, counsel and audience in their seats to await the return of the court, and incommoding no one. Even in the English practice, as it is remarked by Capt. Hall,[3] "the court, instead of clearing the room, sometimes retires to an adjoining apartment to deliberate." In this country, in the case of the trial of Milligan *et al.*, by Military Commission in 1864, the commission, as it is recorded,[4] "retired to an adjoining room for deliberation, to avoid the inconvenience of dismissing the audience assembled to listen to the proceedings." In the absence of any provision of law on the subject, it would be perfectly legal, and in general desirable to the trial, but the same may proceed and the prosecution be completed without regard to his absence.[1]

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[1] That this is for the court to decide for itself; that the question cannot at this stage properly be referred for the opinion of the Attorney General—as was actually proposed in the case of Cadet J. C. Whittaker, in 1881!—see 17 Opins. At. Gen., 54.

[2] Which, however, so far as perceived by the author, in attending personally their military trials, they rarely do except on the final judgment.

[3] "Suggestions for improving the military law," &c. London, 1864, p. 9.

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[4] Printed Trial, p. 73-4.

Where the court has been cleared for deliberation upon an objection, the approved course, after the point has been sufficiently discussed, is for the president to put to the vote of the members the question—"Shall the objection be sustained?" If a minority only vote in the affirmative, or the vote is a tie,[1] the objection is not sustained, and, on the court being re-opened, and this result announced, the question, or answer, objected to is put or given, and recorded. Otherwise, if the objection is sustained by a majority vote.

IV. THE DEFENCE.

In General. It is a principle to be scrupulously observed on a military trial that the accused, whatever his rank,[2] is not only to be deprived of no right but is to be accorded every proper privilege—is in no manner to be embarrassed or placed at a disadvantage, but in every reasonable degree facilitated, in making his defence. As heretofore indicated,[3] he is not to be shackled or otherwise restrained as to his person, unless it may be necessary to prevent escape or violence. If he be under the influence of liquor,[4] or ill, the proceedings should be suspended till he is sober, well, and master of his faculties. That he may be a prisoner, under a previous sentence, should not be allowed to prejudice his defence.[5] On the trial he should be deprived of no material testimony, reasonably obtainable either by subpœna, order, or deposition, whether required to present his original defence,[6] to rebut or reply to the testimony of the prosecution,[7] to impeach its witnesses,[8] to exhibit matters of extenuation,[9] or to establish his own character or record. Subject only to the objections to which all proofs or proceedings are liable, he should be permitted to conduct the examination and cross-examination of the witnesses, and generally to present his defence, in his own way, without restriction by the court.[1] Subject to a reasonable limitation as to evidence of character and evidence purely cumulative, the court should hear his entire material testimony,[2] aiding him where necessary in bringing it fully out, and should protect him from testimony which is legally inadmissible.[3] He should be informed, if he is not aware of it, of his right to be sworn as a witness in his own behalf. The principle thus illustrated, that the accused shall be allowed and enabled to make a free and full defence, while of general application, is especially to be regarded in a case where he is an enlisted man without counsel.

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[1] As to the effect of a *tie vote*, see Chapter XII.

[2] DIGEST, 335.

[3] In Chapter XII.

[4] See Taffe *v.* State, 23 Ark., 34.

[5] That it can constitute no objection to his being tried, see G. O. 30, Dept. of the Pacific, 1864.

[6] G. C. M. O. 43 of 1885; G. O. 40, Fourth Mil. Dist., 1869.

[7] G. O. 11, Dept. of La., 1869; G. C. M. O. 15, Dept. of Dakota, 1887.

[8] G. C. M. O. 21 of 1872.

[9] G. O. 45, Third Mil. Dist., 1868.

Specific Defences—Classification. The prosecution having established, by *prima facie* evidence, the offence, (or at least one of the offences,) charged, the accused is put upon his *defence.* Defences are of two sorts, consisting either—1, of proof that the offence charged was not committed by the accused; or—2, of proof that though the act alleged was committed by him, it did not constitute the offence charged.

1. A defence of the former class will consist in exhibiting some state of facts inconsistent with guilt,—as that the occurrences set forth in the specification did not take place as alleged, or at all; or that the accused did not personally do, or take part in, the act charged; or that he was not present at the alleged place and time of its commission, but was elsewhere, (*alibi,*) and therefore could not have committed it; or that the offence was actually committed by another person, &c. Defences of this class vary with the provisions of the Articles under which the charges are laid

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[1] Kennedy, 104; Napier, 91; also case in G. C. M. O. 6, Dept. of Dakota, 1886. Here the court improperly interrupted a legitimate cross-examination by the accused, a private soldier, of his prosecutor, a sergeant, on the ground that the latter was "not on trial." Disapproved.

[2] G. O. 34, Div. of the Tenn., 1865; G. C. M. O. 17, Dept. of Cal., 1889; Do. 32, Id., 1890.

[3] G. C. M. O. 128, Dept. of Dakota, 1882; Do. 13, Dept. of Texas, 1886.

and with the circumstances of each case, and, except to notice briefly the defence of *alibi*, need not here be considered.[1]

Alibi. This defence, when satisfactorily established, is necessarily a conclusive answer to the charge. It is however easily fabricated, and, even when sustained by the testimony of *bona fide* witnesses, is subject to question by reason of possible and natural errors as to dates, hours of the day, identity of persons, &c.: it is therefore to be entertained with strictness and caution.[2] "A perfect *alibi* must cover the whole time when the presence of the prisoner was required" for the consummation of the offence.[3] Where, however, it fails to include the entire period, it is still to be taken into consideration, and if sufficient to justify a reasonable doubt as to the presence of the accused at the time and place of the act, will properly induce an acquittal by the court.[4] This defence is best tested by a searching cross-examination as to details; it may also be rebutted by any facts tending to disprove it and not already in evidence, as, for example, admissions or statements of the accused at variance with the claim of *alibi*.[5]

2. The defences of the *second* class are such as consist in proof of an absence of criminal *capacity* or *intent*, by reason mainly of Ignorance of fact or of law, Drunkenness, Insanity, Obedience to orders, Compulsion of the enemy, and Requirements of military discipline.

Ignorance of Fact. It is generally laid down that ignorance of fact excuses crime.[6] But this must be an honest or innocent ignorance, and not an ignorance which is the result of carelessness or fault.[7] The theory of course is that where a *bona fide* ignorance of fact exists there must be an absence of the requisite wrongful *intent.* The general rule applies equally to military cases; and the ignorance, to constitute a defence therein, must appear not to have proceeded from any want of vigilance, or from failure to make the inquiries or obtain the information reasonably called for by the obligations and usages of the service. Thus an officer who presents a fraudulent claim against the United States without knowing it to be fraudulent, or a soldier who neglects to report for guard or other duty because ignorant of the fact that he has been duly detailed therefor, is not guilty of a breach, in the one case of the 60th, or in the other of the 33d Article of war, unless his ignorance is the result of his own negligence or wrong-doing.

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[1] As to this class of defences see Chapter XXV, on the Articles of War separately considered.

[2] Wharton, Cr. Ev. § 742; 1 Bishop, C. P. § 1064; Chappel *v.* State, 7 Cold., 92.

[3] 1 Bishop, C. P. § 1067; Baton *v.* State, 22 Fla., 51.

[4] State *v.* Waterman, 1 Nev., 544; State *v.* Howell, 100 Mo., 628.

[5] 1 Bishop, C. P. § 1068.

[6] 3 Greenl. Ev. § 21; 1 Bishop, C. L. § 301.

[7] 1 Bishop, C. L. § 302, 313. Simmons, (§ 593,) in treating of this defence, says:—"Ignorance or mistake is a defect of will, when a man, intending to do a lawful act, does that which is unlawful. As if a soldier, intending to fire on the enemy, kills some of his own people;

Ignorance of Law. On the other hand, it is also a general principle, founded originally "on the necessities of civil government,"[1] that an ignorance or mistake of *law* does not excuse crime, and it is a legal presumption that "every man is presumed to know the laws of the country in which he dwells."[2] In general therefore such ignorance or mistake can have no effect in doing away with the inference, or rebutting the proof, of criminal intent, and the fact of its existence is inadmissible in evidence as a defence.

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or firing by order of his officer at a target, kills a bystander." But this must be qualified as indicated in the text: the ignorance or mistake in such cases, to constitute a sufficient defence, must be such as could not have been guarded against by a reasonable prudence: if in an appreciable degree the result of heedlessness, the defence fails.

Akin to this defence is that sometimes distinguished as the defence of Accident—in regard to which it is observed by Blackstone, (4 Com., 26, 27,) as follows: "If any accidental mischief happens to follow from the performance of a *lawful* act, the party stands excused from all guilt. But if a man be doing anything *unlawful*, and a consequence ensues which he did not foresee or intend, as the death of a man or the like, his want of foresight shall be no excuse; for, being guilty of one offence in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehaviour." And see *post*, Chapter XXV—Fifty-Eighth Article. The first of these statements however must be taken with the qualification above specified.

[1] And on a consideration of "the dangerous extent to which the excuse of ignorance might otherwise be carried." 3 Greenl. Ev. § 20, note.

[2] 3 Greenl. Ev. § 20; 1 Bishop, C. L. § 294.

This principle is equally applicable to military persons so far as regards their knowledge of and amenability to the general law of the land. Such persons also are generally to be presumed to have a knowledge of the special laws and regulations governing the army, as well as of the General Orders which have been officially promulgated and of which they are bound from their position or circumstances to take notice.[1] In the case of *officers* certainly this rule can scarcely admit of an exception; but the question may sometimes arise how far *enlisted men* are to be charged with a knowledge of the Articles of war.

Ignorance of the code on the part of soldiers. This question would be based primarily upon the fact that the 2d Article makes it one of the features of enlistments into the military service that the "*Articles of war shall be read to every enlisted man at the time of, or within six days after, his enlistment.*" and then proceeds to enjoin that he shall thereupon take an oath in which, among other things, he swears that he will observe and obey military orders "*according to the rules and articles of war.*"[2] While in the case of an old or re-enlisted soldier, or one who had been for a considerable period in the service and had had a sufficient opportunity to inform himself as to the provisions of the code, a failure to have complied with the injunction of this article could scarcely constitute a defence, such failure might perhaps have this effect, or at least operate as an extenuation, in the case of a recruit, especially one imperfectly acquainted with the English language. In such a case it would certainly be admissible for the accused to show the fact,[3] and if the offence charged were one of the criminality of which he could not, in his ignorance of military law, have been aware, or the gravity of which he could not have appreciated, the omission of the reading of the Articles upon his enlistment would properly be regarded by the court, if not as a defence, certainly as a palliation of his misconduct. In several cases published in General Orders, such an omission has induced the court to impose a light sentence or the reviewing authority to mitigate the punishment adjudged.[1]

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[1] See De Hart, 164; Benét, 119.

[2] In this connection, note also Art. 128, (commented upon in Chapter XXV.,) which requires that the "articles shall be read and published once in every six months to every garrison, regiment, troop, or company in the service of the United States."

[3] G. C. M. O. 20, Dept. of the East, 1870.

Drunkenness. The common law, though it does not indict for mere drunkenness, views it as a wrongful act.[2] As observes Bishop,[3] "the law deems it wrong for a man to cloud his mind, or excite it to evil action, by the use of intoxicating drinks." Crime therefore, when committed by an individual who has previously placed himself under the influence of an intoxicant, is committed by one who is in the wrong *ab initio;* hence the established general principle of law that voluntary drunkenness furnishes *per se* no excuse or palliation for criminal acts committed during its continuance, and no immunity from the penal consequences of such acts.[4]

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[1] G. O. 23, Army of West Va., 1861; Do. 20, Dept. of the Mo., 1861; Do. 49, Dept. of the Susquehanna, 1864; G. C. M. O. 73, Dept. of the East, 1872; Do. 25, Dept. of Texas, 1874. And see Harcourt, 88.

[2] "It is a great offence in itself." Beverly's Case, 4 Coke, 123, b. And see G. O. 157, Dept. of Va. & No. Ca., 1864. Blackstone refers to it as a "crime." Thus he says, (4 Com., 26,) "The law of England, considering how easy it is to counterfeit this excuse, and how weak an excuse it is, (though real,) will not suffer any man thus to privilege one crime by another." Story J., in U. S. *v.* Cornell, 2 Mason, 11, more accurately expresses the principle as follows: "The vices of men cannot constitute an excuse for their crimes."

[3] 1 C. L. § 397.

[4] "A man who voluntarily puts himself in a condition to have no control of his actions must be held to intend the consequences. The safety of the community requires this rule. Intoxication is so easily counterfeited, and, when real, is so often resorted to as a means of nerving the person up to the commission of some desperate act, and is withal so inexcusable in itself, that the law has never recognized it as an excuse for crime." People *v.* Garbutt, 17 Mich., 19. And see Beverly's Case, 4 Coke, 123, b.; U. S. *v.* Cornell, 2 Mason, 111; U. S. *v.* Drew, 5 Id., 28; Com. *v.* Hawkins, 3 Gray, 466; Kenny *v.* People, 31 N. Y., 330; 1 Bishop, C. L. § 400, and cases cited; Harcourt, 54; G. O. 40, 53, Army of the Potomac, 1862; Do. 70, Dept. of the East, 1865.

In the majority of cases, indeed, drunkenness rather aggravates than extenuates crime, *viz.*, by adding at least a gross and offensive feature to the specific wrongful act. See G. O. 8, Dept. of the Gulf, 1872; G. C. M. O. 21, Dept. of the East, 1871. In U. S. *v.* Claypool, 14 Fed., 127, the Court say—"Drunkenness is no excuse for crime, and in the instances in which it is resorted to, to blunt moral responsibility, it heightens the culpability of the offender."

Where the intoxication is not voluntary—not induced by the party's own act—the principle of responsibility does not apply. Thus, "if a party be made drunk by stratagem, or the fraud of another, he is not re-

But the question whether or not the accused was drunk at the time of the commission of the criminal act may be material as going to indicate what *species* or *quality* of offence was actually committed. Thus there are crimes, or instances of crimes, which can be consummated only where a peculiar and distinctive intent, or a conscious deliberation or premeditation, has concurred with the act, which could not well be possessed or entertained by an intoxicated person. In such cases evidence of the drunken condition of the party at the time of his commission of the alleged crime is held admissible, not to excuse or extenuate the act as such, but to aid in determining whether, in view of the state of his mind, such act amounted to the specific crime charged, or which of two or more crimes, similar but distinguished in degree, it really was in law. Thus in cases of such offences as larceny, robbery, burglary, and passing counterfeit money, which require for their commission a certain specific intent, evidence of drunkenness is admissible as indicating whether the offender was capable of entertaining this intent, or whether his act was anything more than a mere battery, trespass, or mistake.[1] So, upon an indictment for murder, testimony as to the inebriation of the accused at the time of the killing may ordinarily properly be admitted as indicating a mental excitement, confusion, or unconsciousness, incompatible under the circumstances of the case with premeditation or a deliberate intent to take life, and as reducing the crime to the grade of manslaughter, or—where such an offence is created by the State statute—of murder in the second (or other) degree.[2] On the other hand, where, to constitute the

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sponsible." Parsons' Case, 2 Lewin, 144. And see U. S. *v.* Roudenbush, Baldwin, 518. So, where drunkenness is caused by the want of skill or care of a physician. 1 Bishop, C. L. § 405; 3 Greenl. Ev. § 6; People *v.* Robinson, 2 Park., 236.

[1] U. S. *v.* Roudenbush, Baldwin, 514; Rex *v.* Pitman, 2 C. & P., 423; Com. *v.* French, Thach., 163; Pigman *v.* State, 14 Ohio, 555; Nichols *v.* State, 8 Ohio St., 435; State *v.* Schingen, 20 Wis., 74; State *v.* Bell, 29 Iowa, 316; Mooney *v.* State, 33 Ala., 420; Keeton *v.* Com., 92 Ky., 522; People *v.* Harris, 29 Cal., 701; 1 Bishop, C. L. § 408–414; G. C. M. O. 21, Div. Atlantic, 1886.

[2] Hoyt *v.* People, 104 U. S., 931; U. S. *v.* King, 34 Fed., 303; U. S. *v.* Meagher, 37 Fed., 881; State *v.* Johnson, 40 Conn., 136, and 41 Id., 588; People *v.* Rogers, 18 N. Y., 9; People *v.* Hammill, 2 Park., 223; People *v.* Robinson, Id., 235; Friery *v.* People, 54 Barb., 319; State *v.* McCants, 1 Speers, 384; Kelley *v.* State, 3 Sm. & M., 518; Shannahan *v.* Com., 8 Bush, 463; Swan *v.* State, 4 Humph., 136; People *v.*

legal crime, there is required no peculiar intent—no wrongful intent other than that inferable from the act itself—as in cases of assault and battery, rape, or arson, evidence that the offender was intoxicated would, strictly, not be admissible in defence.[1]

In *military* cases, the fact of the drunkenness of the accused, as indicating his state of mind at the time of the alleged offence, whether it may be considered as properly affecting the issue to be tried or only the measure of punishment to be adjudged in the event of conviction, is in practice always admitted in evidence.[2] And where a deliberate purpose or peculiar intent is necessary to constitute the offence, as in cases of disobedience of orders in violation of Art. 21, desertion, mutiny, cowardice, or fraud in violation of Art. 60, the drunkenness, if clearly shown in evidence to have been such as to have incapacitated the party from entertaining such purpose or intent, will ordinarily properly be treated as constituting a legal defence to the specific act charged. In such cases, however, if the drunken act has involved a disorder or neglect of duty prejudicial to good order and military discipline—and such will almost invariably be the fact[3]—the accused may be convicted of an offence under Art. 62, thus incurring some adequate punishment.

It is to be noted that drunkenness, to be admitted in evidence, or to constitute a defence, need not be caused by indulgence in

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Belencia, 21 Cal., 544; People *v.* Williams, 43 Id., 344; 3 Greenl. Ev. § 6, 148; 1 Bishop, C. L. § 401, 409.

To constitute, however, a defence, the mere fact that the party was *under the influence* of liquor is not sufficient. A person in some degree under such influence may nevertheless be capable of conceiving a specific design and of acting with premeditation. If so capable, he must be presumed, like a sober man, to have intended the natural and legitimate consequences of his act. Friery *v.* People; People *v.* Belencia, *ante.*

Where a person is too drunk to entertain the specific intent peculiar to a certain crime, his drunkenness will constitute equally a defence to the charge of an *attempt* to commit it. 1 Bishop, C. L. § 413.

[1] See People *v.* King, 27 Cal., 514; Ferrell *v.* State, 43 Texas, 503.

[2] DIGEST, 379.

[3] Some writers express themselves in general terms to the effect that "drunkenness is in itself a breach of military discipline." See Simmons § 591; Hough, (P.) 86; Harcourt, 56; Napier, 181; Hickman, 130. It certainly can rarely fail to be so when committed in camp or at a military post.

spirituous liquors, but may, with the same effect, result from the voluntary excessive use of an intoxicating drug.[1]

The effect, as a defence, of drunkenness when so extreme as to induce a condition of *insanity* will be noticed under the next head.

Insanity. Insanity is a disease so perverting the reason or moral sense or both as to render a person not accountable for his acts. It is an exceptional and abnormal status, (to be established in general by the testimony of medical experts,[2]) and as the law presumes a man to be sane till he is proved to be the contrary, the burden of maintaining insanity as a defence in a criminal case rests of course upon the accused.[3] To constitute a defence on the ground of insanity it may be made to appear, on the one hand either that the accused, in committing the offence, did not, from mental derangement, comprehend the nature of what he was doing, or did not know that he was doing wrong;[4] or, on the other hand, that, though aware of the nature and consequence of his act, as well as of its wrongfulness or its illegality, he was prompted by such an uncontrollable impulse as not to be a free agent.[5]

Insanity may be general or partial. It may consist of an entire or almost entire dispossession of the reason, or of some delusion or hallucination only,[1] or of a monomania.[2] A partial insanity is no defence where it relates to persons or things not connected with the crime charged.[3] Insanity may also be permanent, or intermittent, or temporary. If the party has lucid intervals when he is free from the disease, he will be responsible for criminal acts committed in such intervals.[4] If at the date of the crime he has quite recovered from a previous derangement, he will be held accountable as if such derangement had never occurred. But the recovery must be clearly shown, otherwise the presumption of law will govern—that insanity once existing has continued to exist.[5]

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[1] DIGEST, 379. And see late case in G. C. M. O. 49 of 1883.

[2] Real *v.* People, 55 Barb., 551; G O. 91, Army of the Potomac, 1863.

But "the opinion on the subject of a non-professional witness, based upon his own observations, is competent evidence, and is entitled to weight, according to the intelligence of the witness, his means of information, and the character of the derangement." Parkhurst *v.* Hosford, 21 Fed., 827.

[3] If enough, however, is shown on the part of the accused, to induce—upon the whole evidence—a reasonable doubt of his sanity, he is entitled to an acquittal. Hopps *v.* People, 31 Ills., 385; Chase *v.* People 40 Id., 353. Otherwise if a mere doubt or possibility only is raised. Lynch *v.* Com., 77 Pa. St., 205.

[4] McNaghten's Case, 10 Clark & Fin., 210; Com. *v.* Rogers, 7 Met., 500; Com. *v.* Mosler, 4 Barr, 264; People *v.* Klein, Edmonds, 13; State *v.* Klinger, 43 Mo., 127. "The legal test of the accountability of a criminal for his acts is his mental ability, at the time of the commission of the crime, to discriminate between right and wrong, with respect to the offence charged in the indictment." U. S. *v.* Young, 25 Fed., 710.

[5] See Com. *v.* Rogers, *ante;* U. S. *v.* Guiteau, 1 Mackey, 498.

Insanity of whatever sort must, to constitute a defence, be absolute. No mere caprice or eccentricity, however arbitrary or extravagant, can be accepted as an excuse for crime.[6]

Insanity may be a defence though resulting solely from intoxication. But such an insanity, to relieve from criminal responsibility, must amount to a fixed mental derangement or delirium existing at the time of the act, and incapacitating the party either to appreciate its wrongfulness or to resist the impulse to commit it.[7]

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[1] "Where the delusion of the party is such that he has a real and firm belief of the existence of a fact which is wholly imaginary, and under that insane belief he does an act which would be justifiable if such fact existed, he is not responsible for such act." Com. *v.* Rogers, 7 Met., 500. "He must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real." McNaghten's Case, 10 Clark & Fin., 211.

[2] Such as *homicidal mania*—a morbid propensity to kill; *kleptomania*—a morbid propensity to steal; *pyromania*—a morbid incendiary propensity; *pseudomania*—a morbid propensity to falsify; and other manias now well recognized in medical jurisprudence. See Whart. & Stillé § 185.

[3] State *v.* Spencer, 1 Zabr., 196; Com. *v.* Mosler, 4 Barr, 266; Bovard *v.* State, 30 Miss., 600.

[4] "It is all one whether the phrenzy be fixed and permanent, or whether it were temporary by force of any disease, if the fact were committed while the party were under that distemper." 1 Hale, P. C., 36.

[5] State *v.* Spencer, 1 Zabr., 210. But it is only established permanent insanity which the law presumes to continue till the contrary is shown; not so with spasmodic or temporary mania. People *v.* Francis, 38 Cal., 183.

[6] 1 Russell, 13; Com. *v.* Haskell, 3 Brewst., 491.

[7] 3 Greenl. Ev. § 6; 1 Bishop, C. L. § 400, 406; Lanergan *v.* People,

In military cases, insanity is not a common *defence*, though the claim has been sometimes advanced by soldiers, in *extenuation* of an offence charged, that their brain has been affected by a previous wound or other injury. Where the defence is actually set up, it should be duly entertained and allowed to be supported by evidence, however improbable it may apparently be.[1] Where insanity or mental incapacity has been shown or indicated on the defence, the court has in some cases proceeded to sentence, accompanying such action with a recommendation that the sentence be remitted or that its execution be suspended till the question of sanity can be more fully investigated;[2] in other cases it has found the accused "guilty without criminality" on the expressed ground of his mental condition:[3] the preferable form is simply to *acquit* on this ground.[4]

If at the arraignment, or pending the trial, the accused, though not alleging it as a defence, manifests insanity or imbecility, the court should suspend proceedings and investigate his condition, reporting the result to the commander;[5] or, preferably, simply

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50 Barb., 277; Com. *v.* Crozier, 1 Brewst., 349; Bailey *v.* State, 26 Ind., 422; Bradley *v.* State, 31 Ind., 492; Tyra *v.* Com., 2 Met. (Ky.) 1; People *v.* Ferriss, 55 Cal., 588; State *v.* Till, 1 Houston, 233, 511.

It may be remarked that a party cannot be held accountable for acts committed while in a condition of excessive intoxication or unnatural excitement brought on by no fault of his own. Thus Hale, (1 P. C., 32,) observes: "If a person, by the unskilfulness of his physician, or by the contrivance of his enemies, eat or drink such a thing as causeth such a temporary or permanent phrenzy as *aconitum* or *nux vomica*, this puts him into the same condition in reference to crimes as any other phrenzy and equally excuseth him."

[1] In a peculiar case in G. O. 29, Div. of the Atlantic, 1874, in which the court assumed to refuse to entertain this defence on the ground that the accused was personally known to a majority of the court, who considered themselves competent to judge of his sanity without evidence, Gen. Hancock disapproved of the proceedings as a method of disposing of a defence "unknown to the administration of justice," as well as at variance with the oath of the members to "determine according to *evidence*."

[2] G. O. 62, 73, First Mil. Dist., 1867, Do. 1, Div. of the Pacific, 1872.

[3] G. O. 13, Northern Dept., 1864. And see cases in G. O. 46 of 1824 and 36 of 1825, where the accused is convicted, but, on account of mental derangement or idiocy, is not sentenced but recommended to be discharged. See also Hickman, 215.

[4] See Simmons § 590; Kennedy, 195, O'Brien, 266.

[5] G. O. 10, Dept. of the Gulf, 1866; G. C. M. O. 39, Dept. of the Mo., 1868. And compare People *v.* Ah Ying, 42 Cal., 19.

report to him the apparent fact, for such investigation or other action as he may see fit to institute.

Obedience to Orders. That the act charged as an offence was done in obedience to the order—verbal or written[1]—of a military superior, is, in general, a good defence at military law.[2]

The act, however, must have been *duly* done—must not have been either wanton or in excess of the authority or discretion conferred by the order. Thus an officer or soldier ordered to suppress a mutiny or disorder or to make an arrest, a guard ordered to keep in custody a prisoner, or a sentinel ordered to prevent persons from passing his post, will not be justified in taking life or in resorting to extreme violence, where the object of the order can be effectually accomplished by more moderate and customary means: otherwise where the forcible resistance of the party, his persistence in disregarding warnings, his sudden flight, &c., render it impracticable to seize or stop him without extreme violence or the use of a deadly weapon.[3]

Further the order, to constitute a defence, must be a *legal* one.[4] It must emanate from a proper officer—a superior authorized to give it—and it must command a thing not in itself unlawful or prohibited by law. In other words, it must be an order which the inferior is bound to obey. While obedience by inferiors is the fundamental principle of the military service, it is yet required to be rendered only to a lawful order.[5] It is "the lawful orders of the superiors appointed over them" that "all inferiors" are, by par. 1 of the Army Regulations, "required to obey strictly and to execute promptly;" and it is the "lawful command of his superior officer" which by the 21st Article of war, "any officer or soldier" may be punished even with death for disobeying. But for the inferior to assume to determine the question of the lawfulness of an order given him by a superior would of itself, as a general rule, amount to insubordination, and such an assumption carried into practice would subvert military discipline.[1] Where the order is apparently regular and lawful on its face, he is not to go behind it to satisfy himself that his superior has proceeded with authority, but is to obey it according to its terms, the only exceptions recognized to the rule of obedience being cases of orders so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness.[2] Such would be a command to violate a specific law of the land or an established custom or written law of the military service, or an arbitrary command imposing an obligation not justified by law or usage,[3] or a command to do a thing wholly irregular and improper given by a superior when incapacitated by intoxication or otherwise to perform his duty. Except in such instances of palpable illegality, which must be of rare occurrence, the inferior should presume that the order was lawful and authorized[1] and obey it accordingly, and in obeying it he can scarcely fail to be held justified by a military court.[2]

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[1] See Pollard *v.* Baldwin, 22 Iowa, 328. So, no particular form of words is required if the order is so expressed as to be intelligible. State *v.* Small and State *v.* Hill, Smith's Reports of Decisions in Militia Cases, pp. 57, 83.

[2] Simmons § 594; Bombay R., 16; DeHart, 165; Benét, 119.

[3] See U. S. *v.* Clark, 31 Fed., 710; DIGEST, 486; and compare title "Requirements of military discipline," *post*, and authorities cited thereunder; also civil cases cited under PART III, *post*.

Where the exceeding of the order was only the result of an extreme zeal, the offence was held to be extenuated. G. O. 5, Dept. of Tenn., 1866.

[4] DIGEST, 27-8. See adjudged cases illustrating this principle cited under PART III, *post*.

[5] See Chapter XXV—TWENTY-FIRST ARTICLE.

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[1] In 2 Opins., 713, the Attorney General, referring to a certain military order, held to be legal, says: "It is not for the subordinate officer who receives it to judge of the fitness or legality of such order; for the case must be an extreme one which would justify him in refusing obedience." In a leading case in the *navy*, Dinsman *v.* Wilkes, 7 Howard, 403, the Supreme Court observes: "There would be an end of all discipline if the seamen and marines on board a ship of war on a distant service were permitted to act upon their own opinion of their rights, and to throw off the authority of the commander whenever they supposed it to be unlawfully exercised."

It may be noted that the ruling in an adjudged *militia* case, State *v.* Woodman, Smith's Reports of Decisions, 25, that, to entitle a superior to the obedience of his inferior, "his command must be lawful *and reasonable*," could scarcely be accepted as good law for the army.

[2] A soldier is justified in law in obeying all orders of his commanding officer, "unless they are obviously, and in a manner patent to common sense, illegal." Forsyth, Const. Law, 216. And see DIGEST, 28; Tullock, 32; O'Brien, 83; De Hart, 166; Desty, Am. C. L., 20 *a*; Despan *v.* Olney, 1 Curtis, 306; Riggs *v.* State, 3 Cold., 85. And compare Chapter XXV—TWENTY-FIRST ARTICLE.

[3] Such as the order to a soldier to take his clothes to be washed by a particular laundress, held illegal in G. C. M. O. 87, Dept. of the East, 1871.

It may be added that an order which might not be regarded as legal in time of peace, may furnish to the inferior obeying it a complete defence in time of *war*, as being warranted by the laws and usages of war. This point, as also this Title in general, will be illustrated in treating of the *civil amenability* of military persons in PART III.

Compulsion of the Enemy, &c. This defence, as establishing an absence of criminal capacity, is recognized as valid in cases of persons charged with having joined the public enemy in war, or with having associated themselves with rebels, mutineers, and the like, and who claim to have done so through compulsion or inevitable necessity. But it is held in the adjudged cases on the subject that such defence can be sustained by nothing short of proof of an immediate danger of death threatened by the enemy or other compelling party; that neither a menace nor impending danger of bodily injury less than loss of life, nor a well-founded apprehension of pecuniary loss or injury to property, will amount to a justification in law.[3] Military courts indeed might feel warranted in relaxing this strict rule in special cases, as it was in fact relaxed in certain extreme cases of prisoners of war charged with desertion to the enemy in the late war.[4] It is to be added that even where the compulsion has originally so overpowered the will of the party as to constitute a legal justification, he may yet forfeit his right to have it allowed as a defence, by voluntarily remaining and acting with the enemy, &c., notwithstanding opportunity of escape has been offered.[1]

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[1] See G. O. 34 of 1852, where the general rule is laid down by the Secretary of War, (Mr. Conrad,) that an inferior "should act upon the reasonable presumption that his superior was authorized to issue an order which he *might* be authorized to issue. If he acts otherwise, he does so at his peril, and subjects himself to the risk of being punished for disobedience of orders."

[2] In a case of an act done under an order admitting of question as to its legality or authority, the inferior who executed it will be more readily justified than the superior who originated the order. See G. O. 27, Dept. of Pa., 1865; McCall *v.* McDowell, Deady, 233.

[3] See McGrowther's Case, Foster, 14; Oldcastle's Case, 1 Hale, P. C., 50; Respublica *v.* McCarthy, 2 Dallas, 87; U. S. *v* Vigol, Id., 347; U. S. *v.* Hodges, 2 Wheeler, Cr. Cas., 477; U. S. *v.* Greiner, 4 Philad., 396, 401; Simmons § 597.

[4] DIGEST, 614.

Requirements of Military Discipline. As an inferior may defend on the ground that his alleged offence was committed in due obedience to a legal order of a superior, so a *superior*, when charged with some extreme violence or severity toward an inferior, may claim in defence that his alleged act was justified by the requirements of military discipline. This defence, however, should not be accepted as sufficient by a court-martial except in cases where it clearly and satisfactorily appears that the insubordination, criminal attempt, or misconduct of the inferior, could not have been repressed or prevented without a resort to the extreme measure which is the subject of the charge. In practice the striking or otherwise assaulting of soldiers, as well as the infliction upon them of summary and unauthorized punishments, by officers, have repeatedly been made the occasion of trials by court-martial, and where not proved to be fully justified by the demands of discipline have induced severe sentences, or, if not thus visited by the courts, (which in some instances have shown themselves too indulgent to the accused,) have called forth severe reprobation from the reviewing commanders.[2] Personal violence employed by an officer against a soldier, by the use of the fist, the sword or otherwise, is always an extreme measure, and must constitute a serious military offence when resorted to in a case where an emphatic and dignified command, or an immediate arrest ordered, would have put an end to the insubordination.[1] And the principle governing such cases is of course to be applied with especial strictness to those in which, in the enforcement of discipline, life has been taken.[2] In all cases indeed of this general class it should be satisfactorily established that the act was imperatively called for by the necessities of discipline at the time; that to all appearance, or in all reasonable probability, the mutineer or rioter could not have been repressed, the escaping deserter or prisoner recaptured, the assailant subdued, the insubordinate inferior restrained or made subordinate, or the rescuer prevented, by any less extreme measure than that actually employed.[3] Otherwise the defence should not be accepted as sufficient. And in time of *peace* the superior should be held to a stricter responsibility than in war.[4] The law on this subject has been abundantly illustrated not only in military cases but in a series of civil prosecutions.[5]

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[1] "The force and fear must continue all the time the party remains with the rebels. It is incumbent on every man who makes force his defence to show an actual force, and that he quitted the service as soon as he could." McGrowther's Case, *ante*. "Those that supplied with victuals Sir John Oldcastle and his accomplices then in rebellion were acquitted by the judgment of the Court, because it was found to be done *pro timore mortis, et quod recesserunt quam cito potuerunt.*" 1 Hale, P. C., 50. And see Respublica *v.* McCarthy, *ante;* DIGEST, 614-15.

[2] See G. O. 81 of 1822; Do. 28 of 1829; Do. 47 of 1830; Do. 64 of 1832; Do. 34, 53 of 1842; Do. 2, 4, 6, 17, 68 of 1843; Do. 2, 39 of 1844; G. C. M. O., 645 of 1865; Do. 80 of 1875, G. O. 53, Dept. of Va. & No. Ca., 1864; Do. 22, Dept. of the Platte, 1867; Do. 40; Dept. of the East, 1868; Do. 9, Div. of the Atlantic, 1869; Do. 5, Id., 1870; Do. 50, Dept. of the Mo., 1871; Do. 93, Dept. of the South, 1873; Do. 62, Div. Atlantic, 1888; Do. 29, Navy Dept., 1890; also Chapter X—"Disciplinary Punishments."

V. THE CONCLUDING STATEMENT.

Of what it Consists. The testimony on both sides being concluded, either party or both parties—the accused *first in order* and the judge advocate *after* him—may present a closing "statement" or address to the court, which may be oral but is commonly read from a writing. While, strictly, the closing of the argument, as of the proof, belongs to the party who has the affirmative of the issue,[1] the order indicated is that now invariably observed in the practice of our courts-martial, whatever be the nature of the defence, if any, which may have been made.[2] The statement, if in writing, is signed and attached to the record as an exhibit; if verbal, it is generally entered in the body of the record,[3] in the words, as nearly as they can be given, of the party. The statement may consist of a brief summary or version of the evidence, with such explanation, or allegation of motive, excuse, matter of extenuation, &c., as the party may desire to offer, or it may embrace, with the facts, a presentation also of the law of the case and an argument both upon the facts and the law.

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[1] See cases in the following Orders in which officers have been held to account for the unjustifiable striking, &c., of soldiers:—G. O. 64 of 1832; Do. 4, 6, 68 of 1843; Do. 2, 39 of 1844; Do. 53, Dept. of Va. & No. Ca., 1864; Do. 22, Dept. of the Platte, 1867; Do. 9, Div. of the Atlantic, 1869; Do. 5, Id., 1870; G. C. M. O. 29, Dept. of the Mo., 1893.

[2] See cases of officers dismissed, &c., for unjustifiably taking the lives of inferiors,—in G. C. M. O. 14 of 1871; Do. 28 of 1873; Do. 47 of 1877; Do. 112, Dept. of the East, 1870; G. O. 87, Northern Dept., 1864; Do. 39, 56, Dept. of the Susquehanna, 1864; Do. 44, Dept. of West Va., 1864; Do. 7, Dept. of Pa., 1865; Do. 17, Dept. of Ky., 1865; Do. 54, Dept. of So. Ca., 1865; Do. 25, Dept. of La., 1866; Do. 89, Second Mil. Dist., 1868. And compare Lieut. Gamage's Case, Hickman, 197–9; Cases of Maxwell and Porteous, Prendergast, 162–7.

[3] See DIGEST, 486. So, at maritime law, the master "may use a deadly weapon, when necessary to suppress a mutiny, but only when mutiny exists or is threatened." Thompson *v.* The Stacey Clarke, 54 Fed., 534.

[4] DIGEST, 486.

[5] U. S. *v.* Cornell, 2 Mason, 60; U. S. *v.* Travers, 2 Wheeler Cr. C., 490; U. S. *v.* Carr, 1 Woods, 484; U. S. *v.* Clark, 31 Fed., 710; U. S. *v.* King, 34 Fed., 302; U. S. *v.* Fullhart, 47 Fed., 802; Case of Sifford, 5 Am. Law Reg., 659; U. S. *v.* Linzee, Utah, (1894.) And compare *In re* Neagle, 39 Fed., 833. [The ruling in the recent case of Iams, (Com. *v.* Hawkins and Streator, Ct. of Com. Pleas, Pa., 1892,) remarked upon in Part III, *post*, is not regarded as sound law or sustained by the precedents.]

Its Privilege. A very considerable freedom is allowable here within certain limits.[4] The accused, for example, in his statement may sharply criticize the testimony as given by the adverse witnesses, and their apparent or supposed *animus* in giving it, as well as the conduct, motives, &c., of the persons through whose acts or at whose instance he has been brought to trial, and especially those of the actual prosecutor or responsible accuser. And evidence of malice on the part of the latter will justify an increased asperity of comment. But between animadversion of this character and defamatory personalities a line should be drawn, and the latter should not be permitted. Further, a proper consideration for the discipline and established military relations of the service should exclude from the statement gratuitously disrespectful language toward superiors or the court, as well as any form of insubordination and defiance of authority.[5] But within these limitations the court will rarely be called upon to check the accused, who, under the critical circumstances in which he is placed, should certainly be allowed the largest latitude of expression consistent with the observance of the conditions mentioned, the non-observance of which indeed could give no additional force to the address.[1]

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[1] Millerd *v.* Thorn, 56 N. Y., 402.

[2] DIGEST, 711. Either party, or both parties, may waive the right to make a statement. Id., 458.

[3] G. O. 4, Dept. of N. Mex., 1864.

[4] See Tytler, 302; Simmons § 587; Pipon & Col., 55; Macomb, 45, 46; O'Brien, 258, 262, De Hart, 160; Benét, 116; Coppée, 82; DIGEST, 711; G. O. 16 of 1851; Do. 31, Div. of the Atlantic, 1873.

[5] It is well remarked by the Secretary of War in G. O. 25 of 1859

Where the statement manifestly exceeds a reasonable freedom, and offends in either of the particulars above indicated, the court may properly warn the accused that he is transcending the proprieties, and if he persists or does not withdraw the objectionable portion, may refuse to allow him to proceed or to admit the statement into the record.[2] In an extreme case the court may properly report the facts to the reviewing authority for the preferring of charges or other action.[3] The use of "menacing words," in the sense of Art. 86, may expose the party to be pro-

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that the statement cannot be allowed to "serve as a cover for language amounting to a breach of military discipline." The use in the statement of unseemly and unmilitary language has been severely commented upon by courts in connection wifh their findings, (see G. O. of May 10, 1816; Lieut. Hyder's Trial, p. 156,) and still more frequently by reviewing officers. G. O. 3 of 1826; Do. 64 of 1827; Do. 16 of 1851; Do. 2 of 1856; Do. 3, Army of the Potomac, 1861; Do. 6, Dept. of La., 1869; also Do. 36, Middle Dept., 1864; Do. 52, Dept. of the Cumberland, 1868, in which—as in some other cases, see *post*—the court is declared to have erred in receiving the paper, or allowing it to be read. See the comment of Gen. Otis upon the disrespectful criticism, by counsel in a concluding argument, of the rulings of the court in the case tried—as closely approaching contempt. G. C. M. O. 24, Dept. of the Columbia, 1894.

[1] As remarked in Bombay R., 16, an indulgence in personalities not only weakens a defence, but has the effect of disposing the pardoning power against lenity toward the accused.

[2] Simmons § 588; McNaghten, 210; Macomb, 46; O'Brien, 258; De Hart, 161; DIGEST, 711. In G. O. 3, Army of the Potomac, 1861, where the statement is reflected upon as of an improper character, it is added:—"The court would have been entirely justified in excluding it." And see case in G. O. 23, Dept. of the Columbia, 1876. In a case in G. O. 157, Navy Dept., 1870, where the accused officer presented a statement "so disrespectful that the court would not receive it," and thereupon declined to offer any other, his action was censured by the Secretary of the Navy.

It is for the *court*, of course, if the occasion justifies it, to rule out the statement. The *judge advocate* has no authority to reject or suppress it, however objectionable. G. O. 31, Div. of the Atlantic, 1873.

[3] In some cases officers have been brought to trial for disrespectful language, &c., contained in their addresses, and in general convicted and sometimes dismissed. G. O. 2 of 1856; Do. 25 of 1859; McNaghten, 209. And see case of summary dismissal cited from James, *post.*

ceeded against as for a contempt. It may be added that mere discursiveness or irrelevancy in the statement will not justify the court in restricting it unless it be thus so protracted as to delay unconscionably the proceedings.

As to the statement or argument on the part of the *prosecution*, it is comparatively rare that this becomes subject to criticism on account of gross improprieties of language. Where, however, it exceeds a proper license, the same procedure is to be observed as in a case of a similar address on the part of the accused.[1]

Procedure as to Reading, &c., of Statement. The statement of the accused, if written, may be read by the accused himself, by his counsel, by a friend, or by the judge advocate. The latter however would with less propriety act herein for the accused, where he proposed himself to present a closing address. In some important cases, in lieu of a written statement, counsel have addressed to the court oral arguments, or arguments part oral and part written, the oral portion being taken down by a stenographer.

The Statement as Evidence. While all due consideration is to be given to a statement properly presented, the statement is *not evidence* but a personal declaration or defence, and cannot legally be acted upon as evidence either by the court or reviewing authority.[2] Nor can it be a vehicle of evidence, or properly embrace documents or other writings, or even averments of material facts,[3] which, if duly introduced, would be evidence; and if such are embraced in it, they are no more evidence than any other part.

In some instances the statement has been *sworn* to under the impression that it will thus answer as a form of the exercise by the accused of the privilege, (accorded by the Act of March 16, 1878,) of testifying in his own behalf, and so become evidence.

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[1] In a case in James, (p. 461, 463,) in which the court, in connection with its judgment, reflects upon the address of the *prosecutor*, (which contained false and malicious charges against a superior officer,) the reviewing authority, concurring, proceeds to pronounce his dismissal from the service.

[2] G. O. 21, Middle Dept., 1865; Do. 28, Dept. of W. Va., 1865; Do. 231, Fifth Mil. Dist., 1869; Do. 23, Dept. of the South, 1870; G. C. M. O. 30, Dept. of the East, 1886; DIGEST, 710.

[3] See Benét, 116.

Such an impression is erroneous;[1] it is irregular and improper to permit the statement to be sworn to, and that it is an affidavit adds nothing to its legal effect.[2] The statement and the testifying are distinct and independent proceedings, and the accused may, and often does, make a statement although he may previously have taken the stand as a witness.[3]

While the statement proper cannot be regarded as evidence, yet where,—as it is expressed in the Digest[4]—the accused "clearly and unequivocally admits therein *facts* material to the prosecution, such may properly be viewed by the court and reviewing officer as practically *in the case.*" Such facts must of course not be inconsistent with the plea. But admissions of this sort can scarcely in any event constitute a sufficient basis for a conviction unless supported by material testimony on the trial.

VI. CONTEMPTS.

Source of the Authority of Courts-Martial to Punish for Contempt. A general power to punish for contempt—necessary as it is to protect the dignity of judicial tribunals and ensure a proper administration of public justice[5]—is inherent in all superior courts of record, independently of legislation.[6] But it "does not arise from the mere exercise of judicial functions,"[7] and so is not commonly possessed by inferior courts unless the same are courts of record, or are specially empowered to exercise this authority by express statute.[8] Courts-martial, not being courts of record,[1] nor indeed, strictly, courts at all in the sense of being a part of the judicial department of the government, but only instrumentalities in aid of the executive arm, of temporary and limited powers, without the capacity to issue process or the means of enforcing their judgments,[2] have no general inherent authority to punish for contempt, and are only authorized so to punish as they are thereto expressly empowered by the 86th Article of war.[3]

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[1] DIGEST, 750.

[2] G. C. M. O. 2, Dept. of the Mo., 1880; Do. 9, Id., 1886; Do. 42, Dept. of Texas, 1880; Do. 6, 13, Id., 1882.

[3] G. C. M. O. 2, Dept. of the Mo., 1880; Do. 19, Id., 1881; DIGEST, 710.

[4] Page 710.

[5] *Ex parte* Robinson, 19 Wallace, 510; *In re* Cooper, 32 Vt., 257; State *v.* Goff, Wright, 79; *Ex parte* Smith, 28 Ind., 47; Samuel, 630; O'Brien, 151–2; De Hart, 102.

[6] 2 Hawkins, c. 1, s. 15; 4 Black. Com. 286; Samuel, 633; U. S. *v.* Hudson, 7 Cranch, 34; Anderson *v.* Dunn, 6 Wheaton, 227; *Ex parte* Robinson, 19 Wallace, 505; *In re* Kerrigan, 33 N. J., 344, 347; *In re* Cooper, 32 Vt., 254.

[7] *In re* Kerrigan, *ante.*

[8] See *In re* Cooper, *ante;* Morrison *v.* McDonald, 21 Me., 556.

Art. 86—Its General Effect. This Article is as follows:—"*A court-martial may punish, at discretion, any person who uses any menacing words, signs, or gestures, in its presence, or who disturbs its proceedings, by any riot or disorder.*" Its proper original may be said to be Art. 54 of the Code of James II, (itself derived from provisions of the Arts. of 1639, 1642 and 1666,) which made punishable the use of "braving or menacing words, signs, or gestures," as also the "drawing of a sword," in the presence of the court. Its effect in our law is to authorize the punishment only of some "*direct*" contempts, or contempts committed in the presence or immediate proximity of the court when in session, as distinguished from "*constructive*" contempts, *i. e.* acts committed at a distance from the court, or beyond its "precinct," but which operate to prevent and obstruct the due administration of justice.[4] Thus, such acts as a refusal or neglect by a *witness* to appear[5] when duly summoned; or a publication in a newspaper reflecting improperly upon the action of the court or its officers in a pending case, &c.,—acts which would be constructive contempts in the civil procedure,—would not be punishable by a court-martial under Art. 86.[6]

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[1] See Chapter V, p. 52.

[2] *Ante*, p. 52.

[3] See 18 Opins. At. Gen., 278.

[4] The two kinds of contempts at common law are sometimes also designated as *criminal* and *constructive*. The direct and constructive contempts which may be taken cognizance of by the U. S. courts are specified in Sec. 725, Rev. Sts. And see *Ex parte* Robinson, 19 Wallace, 511.

[5] That a failure so to appear by a military witness is not punishable as a contempt under Art. 86, but is a "neglect" cognizable under Art. 62, was noticed by Maj. Gen. Thomas, in G. O. 58, Dept. of the Cumberland, 1868.

[6] A larger power is given to *naval* courts-martial by Art. 42 of the Articles for the Government of the Navy.

Further, the Article contemplating *direct* contempts, its effect is to authorize the punishment of the acts which it enumerates only in such manner as direct contempts are properly punished,[1] *viz. summarily.*

Construction of the Article—"*A court-martial.*" This general description includes *inferior* equally with the superior courts-martial. Some of the authorities indeed, repeating the view of Simmons,[2] have expressed the opinion that a regimental or garrison court was not empowered to proceed for a contempt against an officer, although it could do so against an enlisted man.[3] This opinion is founded upon the provision of the code, that such a court shall not *try* a commissioned officer. But here the distinction is lost sight of between a trial and a proceeding for contempt, the latter not being a trial, but a summary assertion and enforcement of executive authority. Thus an officer who by his conduct before an inferior court, as a witness or otherwise, is guilty of a contempt, may be as legally subjected to the punishment provided by the Article as may a soldier, and as properly as he may be before a general court.

The term under consideration, "a court-martial," cannot be held to include a *court of inquiry.*[4] There is not indeed the same reason for investing a court of inquiry with authority to punish for contempt as exists in the case of a court-martial, the former not administering justice or being in fact a court, but only a board or commission of investigation. Moreover the Article, as conferring a summary and in a measure arbitrary power, is to be strictly construed, and, as it does not give this power to courts of inquiry in express terms, cannot properly be held to convey the same by implication.[5]

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[1] Johnston *v.* Com., 1 Bibb, 598; Crow *v.* State, 24 Texas, 13; State *v.* Sauvinet, 24 La. An., 121. And see Samuel, 631–633; Simmons § 434; Harcourt, 158; O'Brien, 311; De Hart, 103.

[2] § 435.

[3] Griffiths, 30; Harcourt, 157; De Hart, 105; Benét, 31.

[4] A contrary view expressed by De Hart, (p. 279,) is repeated by Benét, (p. 182.) It may be noted that the power in question is also not given to courts of inquiry by the Articles specifically relating to the same—Arts. 115–121.

In the *navy* the power to punish for contempts is expressly given to courts of inquiry, by the naval Article 57.

[5] "The power to punish for an alleged contempt is in its nature

It may be observed in this connection that, in order to empower a *court-martial* to proceed as for a contempt, under Art. 86, it is not essential that it should be *sworn* for the trial for which it has assembled. It cannot indeed proceed to *trial* without the additional qualification of an oath, but, as already remarked, the proceeding for a contempt is not a trial. Thus, before the oath is taken by which the organization for the trial is completed, the court is as fully empowered to pass upon and punish a contempt as it is subsequently. Such was in fact the ruling of the Judge Advocate of the Army in an early case in 1844,[1] and such was the action taken by the court in a more recent case, promulgated in General Orders,[2] in which the proceedings were approved by the President.

"May punish at discretion." These words, it is to be remarked, are not mandatory, the court being *authorized*, not *required* to punish. Thus it is always open to the court to *waive* the right of proceeding under the Article, and, instead, to prefer charges against the offender, through its president or judge advocate, or to report the facts to the proper commander for his action.[3] In the majority of the cases in our service this course has in fact been pursued.[4] Except, however, where the offence

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arbitrary, and its exercise is not to be upheld except under the circumstances and in the manner prescribed by law." Batchelder *v.* Moore, 42 Cal., 414.

[1] Private Shalon's case, referred to in note *post*, under "*Punishment.*"

[2] G. C. M. O. 36 of 1870.

[3] Simmons, (§ 434,) referring to this alternative mode of proceeding, says:—"At other times charges have been preferred by the court, or by direction of the confirming or other superior authority, whose notice had been drawn to the offence either by a special report or by the circumstances appearing in the record of the proceedings." And see Samuel, 634; Griffiths, 30; Harcourt, 158; O'Brien, 152; G. O. 3 of 1853.

There is a similar *civil* procedure. Thus the court say in Williamson's Case, 26 Pa. St., 19:—"It (contempt) is punished sometimes by indictment, and sometimes in a summary proceeding." And to a similar effect see U. S. *v.* Jacobi, 1 Flippin, 108, and *In re* Mullee, 7 Blatchford, 24—where it is held that a contempt offered to a U. S. court is a crime against the United States.

[4] See instances in G. O. 14 of 1855; Do. 1 of 1858; G. C. M. O. 37 of 1873; G. O. 63, Dept. of the Tenn., 1863; Do. 126, Sixteenth Army Corps, 1863; G. C. M. O. 9, Fourth Mil. Dist., 1867; G. O. 58, Dept. of the Cumberland, 1868; Do. 17, Dept. of the Columbia, 1871; Do.

committed is of a peculiarly grave character, demanding a severe punishment, and one not appropriate to the action under consideration, it will be the preferable course,[1] and indeed in general the duty of the court,[2] to proceed summarily under the Article.

Punishment. As to the punishment authorized, the "discretion of the court, in the absence of any statutory provision, or defined custom of the service, on the subject, will properly be guided in the first instance by a reference to the common law, and the civil statutes and practice. From these sources it is ascertained that the appropriate and customary punishment for contempt is fine or imprisonment, or fine *with* imprisonment. Such was the usual punishment at common law,[3] and such—*i. e.* fine *or* imprisonment—is the only penalty authorized by the Revised Statutes to be imposed by the courts of the United States.[4] In the civil practice generally the punishment for direct contempts is commonly either a small fine which can be satisfied at the moment or presently, or a brief commitment intended for the temporary restraint of the person;[5] it being evidently deemed to

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79, Dept. of the South, 1874; Do. 39, Div. of the Atlantic, 1876; G. C. M. O. 7, Dept. of the Platte, 1874. And compare cases reported by Hough, 97; Id., (P.) 675. The charge should be laid under Art. 62, or, in an aggravated case of an officer, under Art. 61. The trial should, obviously, be had before a new court, *i. e.*, a court composed of officers other than those who were members of the court before which the contempt was committed. See Hough, (P.) 676; Harcourt, 158.

[1] Samuel, 638; Harcourt, 158; O'Brien, 152; De Hart, 106.

[2] See *In re* Cooper, 32 Vt., 257, where it is said of the power to punish for contempt:—"Its exercise is not merely personal to the court and its dignity: it is due to the authority of law and the administration of justice."

[3] Anciently, upon the theory that the King was present in his courts of justice, and a contempt was a personal affront to his majesty, some contempts were punishable with death. 4 Black. Com., 124. By the Articles of War of the Earls of Northumberland and Essex, in the reign of Chas. I., contempts before military courts were made similarly punishable. Samuel, 630; 1 Clode, (M. F.,) 444.

[4] Rev. Sts., Sec. 125. And see *Ex parte* Robinson, 19 Wallace, 512. The statute is merely declaratory of the common law principle. Anderson *v.* Dunn, 6 Wheaton, 227.

[5] A review of the leading cases shows that the fine adjudged (for a first offence) has generally been not less than five dollars nor more than one hundred dollars. In some cases the judgment has been that the party stand committed to jail till the fine is paid. When imprisonment has

be of the essence of such punishment that it should be simple, light and provisional, in the same manner as the summary proceeding of which it is the result is secondary and incidental in its character.

So, in *military* cases, the appropriate punishment under the Article would in general be either a fine, in the form of a forfeiture of pay moderate in amount and proportioned to the rank and monthly pay of the offender, or a confinement for a certain number of hours or days either in the guard-house or in quarters.[1] The court, however, would not be precluded from substituting, or adding, some other military punishment, not inappropriate to the occasion nor excessive in quality or quantity.[2] The extent

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been imposed, it has very rarely exceeded thirty days and sometimes has been limited to a few hours. In Hill *v.* Crandall, 52 Ills., 70, the offender, an attorney, for contemptuous and defiant language addressed to the court, was required to pay a fine of five dollars and be imprisoned in the county jail until it was paid. In People *v.* Boughton, 1 Edmonds, 143–6, where the Attorney General of the State and a counsel in the case engaged in an altercation and exchanged blows, the court committed them both to the common jail for twenty-four hours. The same imprisonment, with a fine of $100 and costs, was imposed for an assault committed by an attorney on the judge, in State *v.* Garland, 25 La. An., 532. In the case of *In re* Kerrigan, 33 N. J., 344, the punishment for insulting language addressed to the court by a party present, was imprisonment in the county jail for fifteen days. In Middlebrook *v.* State, 43 Conn., 257, the punishment adjudged, for a violent assault committed in the court-room by the plaintiff in a suit, upon the counsel for the defendant, was thirty days in the common jail, with $100 fine and costs. The imprisonment should not be for an indefinite period but for a time practically certain. King *v.* James, 5 B. & Ald., 894; Yates *v.* People, 6 Johns, 339; Yates *v.* Lansing, 9 Johns., 419. In the larger number of cases the penalty has been *fine* only.

[1] In adjudging confinement, the distinction indicated in the Army Regulations between the kinds of restraint appropriate for officers and soldiers, respectively, may ordinarily well be observed. See Samuel, 634. Where, however, an officer is already in close arrest, *i. e.* confined to his quarters, the court is not precluded from imposing, for a contempt, a stricter restraint. Thus in a case of this kind in G. C. M. O. 36 of 1870, the punishment adjudged was—"To be confined in charge of the officer of the guard in the post guard-house, during the pending trial, or during the pleasure of the court, and denied all communication with any one except his counsel."

[2] In a case of a soldier published in G. C. M. O. 1, Dept. of Texas, 1875, there was added to a confinement the penalty of walking for a certain period with a loaded knapsack, weighing 25 pounds.

To the penalties of fine and imprisonment, Samuel, (p. 634,) sub-

and character of the penalty will depend mainly upon the particular *circumstances* which exhibit the offence as aggravated or the reverse,[1] and upon the *intent* of the party.[2] In imposing the punishment some regard may well be had to the relation which the offender bears to the trial or investigation. Thus if he be the accused, his punishment should, if practicable, not be such as to interfere either with the regular course of the trial or with the presentation of his defence to the same.[3]

It is quite clear that the imposition of dismissal, suspension, dishonorable discharge, prolonged forfeiture, or protracted or very severe imprisonment—penalties which have been resorted to in some cases[4]—would be quite foreign to the purpose and

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joins—for cases of officers—"reprimand." If the court resort to this punishment, it may adjudge the reprimand to be administered at once by the president of the court, or by the reviewing authority in passing upon the whole case.

[1] The offence will be aggravated where it is *repeated*, (see, for example, The King *v.* Davison, 4 B. & Ald., 333, where the prisoner, who conducted his own defence, was, for repeated improper language used in his argument, fined successively £20, £40, and again £40;) or where it is a *second* offence though of a different nature, (see State *v.* Garland, 25 La. An., 532;) or where it is committed after a warning or admonition from the court, (as in both these cases;) or where it is justified by the party on the hearing, (as in State *v.* Garland.) See *post*—"Purging the Contempt."

[2] See Sturoc's case, 48 N. H., 432. As to the effect of disavowals of improper intent, and of expressions of regret, in excusing or purging the contempt, see *post.*

[3] See The King *v.* Davison, 4 B. & Ald., 340.

[4] The following were instances of summary punishment for contempt, excessive in kind or degree: Case of Lt. Col. Backenstos, adjudged "to be cashiered," published in G. O. 14 of 1850; A case, cited by Hough, (C. M., 455,) of a surgeon, punished by "suspension from rank, pay and allowances for six months;" A case of a soldier mentioned by Simmons, (§ 435, note,) and also Hough, (P., 676,) condemned to transportation for life;" Case of Private Shalon, 7th U. S. Infy., (1844,) adjudged "to be confined for six months in a dark prison—every other month on bread and water, and chained to the floor—and to forfeit all pay for the same period;" A case published in G. C. M. O. 37, Fourth Mil. Dist., 1868, of a civilian witness at a trial before a military commission, adjudged "to be confined at hard labor for one year, and to pay a fine of five hundred dollars, and to be further confined until such fine be paid." In the first and third of these cases the punishment was formally disapproved by the reviewing authority. In Shalon's case it was materially mitigated. In the last case, the party having been in confinement for two months, the punishment was remitted by the District Commander, who remarked that

province of a proceeding for contempt, and should properly be regarded as beyond the scope of the authority of a court-martial under the 86th Article. Punishments of this kind might indeed be appropriate where the party, instead of being proceeded against as for a contempt, was brought to trial upon a charge laid under Art. 61 or 62, for some grave military offence involved in his conduct.

Execution of the punishment. The punishment, if a fine or forfeiture to pay, may be executed through the orders of the reviewing officer, in passing upon the proceedings, in the same manner as a sentence.[1] If the punishment consists in imprisonment or other bodily restraint, it may be executed through the order of the convening authority, upon a reference and report of the facts to him by the court, or, if the offender is a member of the command of the post commander, the court, which is incapable of executing its own mandate,[2] may apply to such commander, who, if he has the means for the purpose, will execute the judgment with the same propriety and legality as he executes the arrest of the accused under the charges, furnishes the court with a guard, or performs any other ministerial function in aid of its proceedings.[3]

"Any person." This designation includes certainly any

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confinement *at hard labor*, for contempt of court, was "unusual and improper." It is believed, however, that such a penalty would not necessarily be improper if restricted to a brief term. In a case in G. O. 79, Dept. of the South, 1874, where a soldier, for a contempt not aggravated, was adjudged to be confined at hard labor for six months, (with a forfeiture of $5 per month,) the punishment was declared by Gen. McDowell to be "excessive" and was mitigated to "confinement at hard labor for one month."

[1] That an accused may have been *acquitted* of a charge for which he was on trial cannot affect the authority to execute a punishment adjudged him, pending the trial, for a contempt committed. See Hough, (Practice,) 250, note 41.

[2] It would appear that *English* courts-martial have sometimes placed officers in arrest for contempt. See Samuel, 635; Hough, 455. Whether or not such an authority would now be conceded to them, it is clear that none such can be exercised by courts-martial in this country. See Chapter IX.

[3] Where courts-martial are attended by provost-marshals, these officials might be sufficient for the execution of some minor punishments under Art. 86.

military person who may be before the court, whether in an official capacity or otherwise. It thus embraces the judge advocate[1] or the accused, a military witness, prosecutor, counsel, clerk, or guard, or any officer or soldier who may be present as a spectator. The rank of the person is immaterial.[2] Though the party chargeable with the contempt may be senior in rank to all the members of the court, he is yet equally subject to be proceeded against under the Article as if he were the youngest officer in date in the service. To this effect was the ruling in the leading case of Major John Browne of the British army, in 1786, as reported by Samuel and other subsequent writers.[3]

Inclusion of civilians. Whether the term "any person" includes also *civilians*, is a question upon which the authorities have differed.[4] In the opinion of the author, a court-martial, while empowered of course to cause a disorderly civilian to be ejected from the court-room, is also empowered, under the comprehensive terms of Art. 86, to punish, for a direct contempt, by fine or imprisonment, any such civil person, whether witness, clerk, reporter, counsel, or a mere spectator at the trial, with the same legality as it may an officer or soldier of the army.[5] The enforcing of the Article in the instance of a civil person is not an exercise of military *jurisdiction* over him. He is not subjected to trial and punishment for a military offence, but to the legal penalties of a defiance of the authority of the United States offered to its legally-constituted representative. Any less power in the court than one of summary punishment would be imperfect and insufficient under the circumstances. "The mere power," says Aldis J., in a case in Vermont,[1] to remove disorderly persons from the court-room would be wholly inadequate to secure either the proper transaction and dispatch of business or the respect and obedience due to the court and necessary for the administration of justice." In view, however, of the embarrassments likely to attend the execution through military machinery of a punishment adjudged a civilian for a contempt under the Article, it would in general be advised that a court-martial, in a case of such contempt, should confine itself to causing the party to be removed as a disorderly person, and, in an aggravated instance, where practicable, procuring a complaint to be lodged against him for a breach of the public peace. Where, however, the civilian is a person employed by the military authorities in connection with the army as a post-trader, quartermaster's employee, &c., the preferable course will generally be to punish him by a confinement in the post guard-house, for a brief period or till he shall purge his contempt.

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[1] The case of the judge advocate, however, is so assimilated to that of a member, (see text *post*,) that although the court would be fully empowered to punish him summarily for a contempt, it would probably, in a case of any aggravation, prefer to adjourn, and, reporting the facts to the convening authority, (with formal charges, if thought proper,) apply at the same time for the detail of a new judge advocate.

[2] See O'Brien, 152–3; also McNaghten, 165–168, where is aptly cited the case of the commitment, for an aggravated contempt, of the Prince of Wales, afterwards Henry V, by Sir Wm. Gascoigne as Chief Justice of the King's Bench.

[3] See especially Samuel, 636.

[4] Samuel, (p. 638–9; and see Harcourt, 158; Clode, 138,) held the negative; McNaghten, (p. 168–9,) and Hough, (p. 440,) the affirmative. De Hart, (p. 106–8,) while treating the question as one involved in doubt, seems to be of opinion that a court-martial may not punish a civilian for a contempt under the Article. Benét, (p. 32,) expresses a contrary view.

[5] The Attorney General, (18 Opins., 280,) similarly construes the term "all persons," in Art. 6, Sec. XIV, of the Articles of 1776, which relates also to contempts. "The terms of this Article," he says, "are broad enough to include civilian witnesses, and it was doubtless meant to apply to them."

Members of the court not included. Though it is not a necessary implication from the terms of the Article, it is yet a natural inference from its context, that it could not have been intended in the designation "*any person*," comprehensive though it be, to include a member of the court itself. And so it has been held in this country; a direct ruling on the point by the Secretary of War having been made in 1850, in the case of Lt. Col. Backenstos. This officer, as senior member and president of a general court-martial, was summarily proceeded against by the court as for a contempt, (consisting in certain arbitrary and disorderly conduct,) and was sentenced "to be expelled from the court and to be cashiered." Upon this action the following decision was announced in General Orders:[2]—"The proceedings of this court having been submitted to the President of the United States are not approved, as the 76th" (the present 86th) "Article of war does not confer on a court-martial the power to punish its own members." In a case of this character, therefore, the proper course, in view of this rule, would in general be for the court to adjourn and at once report the facts to the convening authority, (with a formal charge preferred, if deemed desirable,) with a view to having the offending member brought to trial for conduct prejudicial to good order and military discipline.[1]

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[1] *In re* Cooper, 32 Vt., 258.

[2] G. O. 14 of 1850.

"Who uses any menacing words, signs, or gestures, in its presence." This phraseology is unsatisfactory; the employment of the single descriptive term "menacing" having the effect of excluding from the cognizance of the court, under the Article, the use, in its presence, of improper words, &c., which yet do not express or involve a threat or defiance.[2] Thus language, however disrespectful, if it be not of a minacious character, cannot, unless actually amounting to or creating a *disorder*, in the sense of the further provision of the Article,[3] be made the occasion of summary proceedings and punishment as for a contempt—a defect certainly in the statute.

Menacing or threatening words or acts aimed at the *court* or its individual *members* are no doubt especially contemplated by the Article;[4] and words of this nature may either be spoken, or presented in a writing, as, for instance, in the closing address or argument.[1] Menaces, however, if directed at the accused or a witness, or at the judge advocate, or any other person in a *quasi* official position before the court or under its legal protection, would also, it is conceived, properly fall within the designation of the Article, such conduct being equally a contempt of the court itself.[2] As to the case of a witness, while the ordinary bullying practised sometimes toward persons on the stand would scarcely come under the description of "menacing words, gestures," &c., an attempt to intimidate a witness, by alarming him with the prospect of some specific danger in case he should make or not make a certain disclosure or statement, might readily be deemed to fall within the category.

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[1] See Army Regulations, par. 1006, based on the case of Backenstos.

[2] "As to *menacing* words, they imply a threat." Hough, (C. M.,) 442. The manner, tone, emphasis, &c., of the speaker, with the surrounding circumstances, are to be taken into consideration in determining whether his language imports a menace. See *Ex parte* Robinson, 19 Wallace, 511; *In re* Cooper, 32 Vt., 256; Hough, 455.

[3] Such were the character and circumstances of the language employed in the case of contempt published in G. O. 17, Dept. of the Columbia, 1871, where the accused, when asked by the judge advocate if he had any statement to make to the court, replied—"I'll be God damned if I have any statement to make," and left the court-room abruptly and without proper authority. And see cases in G. C. M. O. 1, Dept. of Texas, 1875; G. O. 79, Dept. of the South, 1874; G. O. 126, Sixteenth Army Corps, 1863—where disrespectful and insolent language was, apparently as constituting a *disorder*, treated as a contempt.

[4] See the instance given in James, 504, and Hough, 454, of an officer, who, as prosecutor, repeatedly menaced the court "with the vengeance of a superior tribunal, accompanying his expressions by the most defying attitudes."

The term "*in its presence*" is taken to mean before the court in the court-room, or in its sight or hearing, and also while it is in session. Menacing language, &c., however, used toward the court or a member, during a recess,—the day's session of the court not having been adjourned,—might perhaps be regarded as within the terms of the Article.[3]

"Or who disturbs its proceedings by any riot or disorder." The word "riot" is regarded as here employed not in its strictly legal sense, but rather in the sense in which it is commonly used, as meaning—to cite the definition of Webster—"wanton or unrestrained behaviour; uproar; tumult." The term "disorder" is still more general, and, in a broad sense, (analogous to that in which it is employed in Art. 62,) would mean, literally, any conduct in breach of the *order* of the proceedings. But, in the connection in which it here occurs, it is construed as implying more than a mere irregularity, and as importing disorder so rude and pronounced as to amount to a positive intrusion upon and interruption of the proceedings of the court. The more familiar examples of such a disorder and disturbance as are held to be contemplated by the Article are—

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[1] See case cited in Hough, 455; also The King *v.* Davison, cited in note *ante*.

[2] See 4 Black. Com., 126; Hough, 443.

[3] Compare State *v.* Garland, 25 La. An., 532, where an assault committed upon the judge, during a recess of the court, but while it remained unadjourned, was held a direct contempt, and punished as stated in note *ante*.

assaults committed upon members,[1] or upon persons connected with the court or properly before it;[2] altercations between counsel[3] or spectators;[4] drunken[5] or indecent[6] conduct; loud and continued conversation;[7] any noise or confusion which prevents the court from hearing the testimony, &c.;[8] any shouting, cheering, or other expression of applause or disapprobation, especially if repeated after being checked;[1] contumelious or otherwise disrespectful language, addressed to the court or a member or the judge advocate, of so intemperate a character as to derange the proceedings, especially if persisted in after a warning from the court.[2]

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[1] See cases reported in Hough, 97; Id., (P.,) 675; also in note *ante*, under "Punishment."

[2] "Likewise all such as are guilty of any injurious treatment to those who are immediately under the protection of a court of justice, are punishable by fine and imprisonment." 4 Black. Com., 126. And see Hough, 442. The leading instance in our service is that published in G. O. 63, Dept. of the Tenn., 1863, where a witness assaulted and killed, by shooting with a pistol, in the court-room, the accused, for attempting to impeach his testimony. He was not proceeded against under Art. 86, but tried for murder.

[3] See case of People *v.* Boughton, cited in note under "Punishment," *ante*. But hasty expressions of counsel, under excitement, will ordinarily be overlooked where no contempt is intended. St. Croix *v.* Piatt, Wright, 532.

[4] See U. S. *v.* Emerson, 4 Cranch C., 188; State *v.* Woodfin, 5 Ire., 200. The latter case was one of a breach of the peace *in facie curiæ*, consisting in a fight between two individuals just outside of the court-room.

[5] In G. C. M. O. 59, Dept. of the Platte, 1872, a case is referred to of a soldier ordered by the court to be confined for contempt in using profane language, in his testimony as a witness, while apparently intoxicated. In general, however, contempts by way of drunken conduct, on the part not only of members, but also of parties or witnesses, have been made the occasion of formal charges, under Art. 62, (formerly Art. 99,) and regular trials before new courts. See cases of this kind in G. O. 14 of 1855; Do. 1 of 1858; G. C. M. O. 52, Dept. of Va., 1865; Do. 9, Fourth Mil. Dist., 1867; Do. 7. Dept. of the Platte, 1874; G. O. 39, Div. of the Atlantic, 1876. In G. C. M. O. 39, Hdqrs. of Army, 1877, is a case of an officer charged and convicted under both Art. 61 and Art. 62, for appearing in uniform drunk before the court by which he was being tried. In the case in G. O. 1 of 1858, the offender, a member, became disorderly *upon being challenged.*

[6] In G. C. M. O. 1, Dept. of Texas, 1875, it was properly held *not* to constitute a contempt under Art. 86 for a soldier to come before the court by which he was to be tried with his clothing in disorder.

[7] In the case of Acton tried for murder, 17 Howell's State Trials, 463, (1729,) the judge said—"Crier, make proclamation to keep silence under pain of imprisonment. This is a trial for life and death, and I shall commit any one that don't hold their peace."

[8] See Whittem *v.* State, 36 Ind., 212; State *v.* Goff, Wright, 78; State *v.* Coulter, Id., 421; Hough, 444. "It is sufficient that the noise or hindrance be such, however small, so that the court cannot distinctly hear what is addressed to it, by its members, &c., or those before the court as witnesses." Id., 452.

Acts not disorders—Contumacy of witness. But acts not of a violent or disturbing character, though they might constitute contempts at common law and before the civil courts, would not be *disorders* in the sense of the present Article. Thus a quiet refusal by a witness to be sworn, or to answer a proper question on his examination, or a standing mute or simple refusal to testify at all, would not be punishable as a disorder and contempt before a court-martial. In a case indeed of a military witness, whose duty it clearly was to furnish evidence of material facts of which he was cognizant, a refusal to testify would properly subject him to a charge and trial under Art. 62. But a *civilian* witness declining thus to testify would, under our existing law, do so with entire impunity.[3] The British code, (Army

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[1] In the report of the case of Colledge, in 8 How. S. T., 714, (1681,) after the statement of the verdict of guilty, the following occurs:—"At which there was a great shout given, at which the Court being offended, one person who was observed by the Crier to be particularly concerned in the shout, was committed to gaol for that night, but the next morning, having received a public reproof, was discharged." In the report of the trial of the Dean of St. Asaph, 21 How. S. T., 865, (1783,) during the recital of some remarks of Erskine as counsel for the defence, this note is made :—" Here some of the audience clapped, and the Court fined a gentleman £20." In Stone's case, 6 Term, 530, (also reported in 25 How. S. T., 1438,) it is narrated that:—" On this, (the rendering of the verdict of not guilty,) there was considerable shout in the hall; and a man of the name of Thompson, jumping up in the middle of the court, waving his hat and halloing, was taken into custody and find £20." But see the note to the case of the Earl of Shaftesbury, 8 Term, 821, (1681,) where, when the grand jury " returned the bill '*Ignoramus*,' the people fell a hollowing and shouting," but no one was punished for contempt.

[2] See case in G. C. M. O. 1, Dept. of Texas, 1875; also Hill *v.* Crandall, cited in note *ante*, under "*Punishment.*"

[3] A ruling to this effect by the Judge Advocate General, (DIGEST, 99,) was followed by a similar opinion of the Attorney General, (18 Opins., 278,) in case of a civilian witness who, on being duly summoned and appearing before a court-martial, stood mute. The Atty. Gen., in holding that such a witness could not be compelled to testify or punished for not testifying, notices that the power to punish in such

Act, sec. 126,) adequately provides for such a case by authorizing the President of the court-martial to certify the offence of such a person to a *court of law*, which may then proceed duly to punish the witness for his contempt as in civil cases. It is a serious defect in our system, which may, in an important case, entail a serious failure of justice, that our courts-martial (and civil courts) are wholly without power to take action in such an instance.

Unintentional contempt—Presence of the court. It is not essential that a disturbance of the court or interruption of its business should have been *purposed* by the party; that he disclaims any such purpose will not affect the offence.[1] "The question whether a contempt has or has not been committed does not depend on the intention of the party but upon the act he has done. It is a conclusion of law from the act."[2] Where, however, the court is satisfied that the contempt was quite unintentional, it will certainly impose a less penalty,[3] or it may, in its discretion, refrain from proceeding to punish at all.[4]

The words "in its presence" not being connected in the context with the clause of the Article under consideration, the same may be held to include disorders which, though disturbing the proceedings, are not committed in the court-room itself. Under Sec. 725, Rev. Sts., which authorizes the infliction by U. S.

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a case was once conferred upon courts-martial of the army by Art. 6 of Sec. XIV of the Code of 1776, as also upon *militia* courts by the Act of April 18, 1814, c. 82, s. 4. Referring to Art. 86, he says—"By this article Congress has given a court-martial power to punish for contempts; but the power is in terms restricted to cases of acts of menace in its presence or of disorder by which its proceedings are disturbed. In thus limiting the grant of power to certain cases designated in the statute, by a familiar rule of interpretation it is to be implied that all others were meant to be excluded therefrom." The view thus expressed was approved by the Secretary of War in a communication to the Comdg. Gen., Dept. of Texas, Oct. 27, 1885, stating it as his decision that "courts-martial are powerless to punish civilians for failure to testify."

But though a civilian witness cannot be compelled to testify against his will, his *attendance* will entitle him to his witness fees, (Circ. No. 1, H. A., 1886,)—a peculiar anomaly in our military law.

[1] Watson *v.* Savings Bk., 5 So. Ca., 159. And see State *v.* Garland, 25 La. An., 533.

[2] Wartman *v.* Wartman, Taney, 370.

[3] See Sturoc's Case, 48 N. H., 432.

[4] See *post*, under "*Purging the contempt.*"

courts of summary punishment for contempts when committed "in the presence of the court or so near thereto as to obstruct the administration of justice," it has been held that disorderly conduct at or near the entrance of the court-room, or outside but in the sight or hearing of the court, and so loud or conspicuous as to interrupt and embarrass the proceedings, was a contempt;[1] and a similar rule might properly be applied to like disturbances of military trials.[2]

Form of Procedure under the Article. As to the manner and form of the exercise by the court of the summary power conferred by the Article, it is first to be remarked that a timely warning, call to order, or command to silence, by the president as the organ of the court, at the first symptom of any disorderly manifestation, may often have the effect of preventing the occurrence of an act of the class which the Article is designed to correct.[3]

As to the procedure when the court finds itself called upon to avail itself of the discretion to punish, *i. e.* to award punishment —it is clear, as has already been indicated, that no form of trial or investigation is required. The act having transpired in the presence, (or in the sight or hearing,) of the court, no evidence is in general necessary to inform it of the circumstances, nor is any introduced in practice.[4] Opportunity is properly given the offender to present anything he may have to offer in excuse or explanation of his language or behaviour,[5] but beyond this no formality whatever is called for. The proceeding not being a trial, it is wholly unnecessary to swear the court for the purpose, and it is also quite unnecessary, (though this has sometimes been done,) to have a charge and specification preferred or prepared.[1] As there is no formal accusation, so there is no arraignment, plea, prosecution, or defence. As aptly observed by the court in a case already cited,[2]—"Where the contempt is committed in the presence of the court, and the court acts upon view, * * * and inflicts the punishment, there will be no charge, no plea, no issue, no trial."

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[1] U. S. *v.* Emerson, 4 Cranch C., 188; U. S. *v.* Carter, 3 Id., 423. And see, to a similar effect, in the State courts, State *v.* Woodfin, 5 Ire., 200; State *v.* Goff, Wright, 78; State *v.* Coulter, Id., 421.

[2] "Any noise close to, or so near the court as to disturb their proceeding is a contempt of court. * * * Sentries should be stationed, if required, to prevent such a disturbance." Hough, 444. And see 4 Black. Com., 125; Whittem *v.* State, 36 Ind., 212.

[3] See Hough, 444; Acton's case, cited in note *ante;* State *v.* Goff, Wright, 78.

[4] The punishment "may be adjudged without the previous form of trial; the offence being committed under the eye of the court, and incapable of being more clearly or satisfactorily proved." Samuel, 634.

[5] The court proceeds to punish after such hearing as may be deemed "just and necessary." A. & K. R. R. Co. *v.* A. R. R. Co., 49 Maine, 400. And see Fanshawe *v.* Tracy, 4 Bissell, 497; Wartman *v.* Wartman, Taney, 370; Samuel, 634-5; Simmons § 434; O'Brien, 152; De Hart, 103; Benét, 31. In a case published in G. C. M. O. 37, Fourth Mil. Dist., 1868, where the court denied the application of the party to have a statement of his defence to the charge of contempt put on rec-

All therefore that is required is, that the court should temporarily discontinue the investigation or other business upon which it is engaged, and proceed at once, or as soon as may be convenient, to pass upon the matter of the contempt, as an interlocutory question. The question is in general initiated by the motion of a member or the judge advocate, and the court sometimes clears to consider whether it will take action. The proceeding will consist mainly in the court announcing to the party, through its president, that he is held to have committed a contempt within the description of the Article, and that it is proposed to punish him for the same unless explained away, and calling upon him to make any explanation or statement he may have to offer. This action will preferably be taken in open court, as in civil cases. Proper opportunity for a hearing being afforded, and the party's statement, if any, being made, deliberation is then had, and a punishment—a contempt being found—is adjudged. If required to be immediately or presently enforced, the punishment as declared is without delay reported to the convening authority, or to the commander of the post or station if competent to execute it. A full record of the proceeding is at once made by the judge advocate,[3] not separate from but in and as a part of the

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ord, the reviewing authority, (Gen. Gillem,) observes:—"He should not only have been permitted to make his statement, if pertinent to the question, but should have been allowed a full opportunity to be heard himself, or by counsel, to show cause, if he could, why he should not be punished for contempt."

[1] The view, as expressed by O'Brien, (p. 152,) that "the court must be sworn and a distinct charge made out," and repeated by Benét, (p. 31,) is clearly founded upon a misapprehension of the legal character of the proceeding.

[2] Whittem *v.* State, 36 Ind., 211.

[3] That an immediate record should be made, see 2 Hawkins, c. 22, s. 1; State *v.* Matthews, 37 N. H., 453.

regular record of the trial, showing the occasion and circumstances of the contempt, the words or acts which constituted it, the excuse or statement, if any, of the party, the action taken by the court, its judgment, the disposition of the offender, &c.

Purging the Contempt—Remission of the Punishment. At the hearing, or before the court-martial has proceeded to judgment upon the contempt, it may, in its discretion, receive an apology for his conduct from the offender, and, if the same is deemed sufficient and satisfactory, may consider him to have "purged" himself of the contempt, and so discontinue the special proceeding.[1] But, as is observed by the court in a late case,[2] "an expression of regret for the contempt committed is always held to be essential to purge the contempt;" a mere "disavowal of an improper motive" not being sufficient. Much less, where the disavowal is accompanied by a justification by the party of his conduct; for this, as held in another case,[3] is an *aggravation* of the contempt.

Where, however, the offence is one of a grave character, an expression of regret, or disclaimer of ill intent, on the part of the offender, though, when offered in good faith, it may, as has been seen, go to reduce the punishment, will not in general be accepted as purging the contempt, or properly relieving the party from the penalty which public policy requires should be enforced.[4]

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[1] See Simmons § 434. In Capt. Burke's case, (Samuel, 635,) the officer "apologized for his conduct," and, "after a slight admonition and reprimand, was discharged of the contempt." In State *v.* Coulter, Wright, 427, the court, in accepting the apology of the defendants, (officers of a militia company, marched and exercised with loud martial music in the immediate neighborhood of the court-house,) as purging the contempt, say:—"They disclaim on oath any intention of interrupting the business of the court, or design to contemn its authority. They assert the most perfect respect for the court and their want of knowledge that it was holding its session as they approached and passed the court-house. Singular as this state of fact appears, the character of these gentlemen forbids all suspicion that they have not uttered the truth." And see G. O. 79, Dept. of the South, 1874.

[2] Watson *v.* Savings Bk., 5 So. Ca., 159.

[3] State *v.* Garland, 25 La. An., 532.

[4] In Sturoc's case, 48 N. H., 428, Perley C. J., says:—"The defendant," (the publisher of a newspaper which had commented improperly upon the case,) "cannot discharge himself by alleging that he meant no harm and did not suppose he was doing anything illegal." In

But after a court-martial has passed finally upon a matter of contempt, and imposed a specific punishment therefor, it is not, in the opinion of the author, empowered to remit, in whole or in part, the penalty awarded.[1] The contempt, like any other military offence, is a crime against the United States;[2] a fine imposed by way of punishment accrues to the United States;[3] and, as to an imprisonment or other punishment, the same, when once duly adjudged according to Art. 86, is, as to the matter of its execution, equally with a sentence imposed by the authority of any other article, beyond the control of the court. The power of remission, therefore, can be exercised only by the military commander authorized thereto by Art. 112,[4] or by the President.[5]

People *v.* Boughton, (where the contempt consisted in a personal altercation and exchange of blows between the counsel in open court,) the judge, notwithstanding the regrets expressed by both the offending parties, declined to abate the punishment—twenty-four hours in jail—and adjourned the court in order that it might be fully executed.

[1] In a case, already cited, published in G. C. M. O. 36 of 1870, the court, after imposing the punishment of confinement, accepted an apology from the offender and remitted the punishment. Here indeed the confinement adjudged was "during the pleasure of the court." But this form of punishment, besides being objectionable as indefinite, is regarded as unauthorized, since the term of a confinement adjudged for a military offence cannot be made to depend upon the will of the court.

[2] U. S. *v.* Jacobi, Flippin, 108; *In re* Mullee, cited in note *post.*

[3] Fanshawe *v.* Tracy, 4 Bissell, 498. And see Matter of Rhodes, 65 No. Ca., 518; Morris *v.* Whitehead, Id., 637; also Opins. of At. Gen. cited in second succeeding note.

[4] Art. 112 authorizes, in general terms, officers ordering courts-martial to "pardon or mitigate any punishment adjudged" by them, (certain special penalties only being excepted, which are reserved for the action of the President.)

[5] It is held in *In re* Mullee, 7 Blatchford, 24, that a contempt of a U. S. court, being an offence against the United States, the *court* cannot relieve or discharge the offender from the punishment imposed, but the President, as the pardoning power, can alone do so. And see 3 Opins. At. Gen., 622; 4 Id., 458, where it is held that the pardoning power of the President extends to the remission of fines imposed for contempts by U. S. Courts. And see State *v.* Sauvinet, 24 La. An., 119, as to the similar authority of a State executive to pardon in cases of contempts of the State courts.

The court, however, (or rather the members,) may *recommend* the remission of the punishment by the proper authority; as was done in a case in G. C. M. O. 52, Dept. of Va., 1865, where a witness, who had been punished with confinement for drunkenness in court, appeared the next day and apologized.

CHAPTER XVIII.

EVIDENCE.

COURTS-MARTIAL, which are bound in general to observe the fundamental rules of law and principles of justice observed and expounded by the civil judicature,[1] are also in general to be governed, upon trials, by the *rules of evidence* of the common law as recognized and followed by the criminal courts of the country.[2] Thus, indeed, it is laid down and repeated by the authorities on the subject; and inasmuch as the rules of evidence are in the main the result of the best wisdom and experience of the past, approved and ratified by modern intelligence, it is clear that military tribunals cannot in general safely assume to reject or ignore them. But the essence of all military proceedings is summary and vigorous action, and, moreover, courts-martial are no part of the Judiciary of the United States, are not even courts in the full sense of the term, but are, in peace as well as in war, simply bodies of military men ordered to investigate accusations, arrive at facts, and—where just—recommend a punishment. In the absence, therefore, of statutory direction, they can scarcely be held bound to the same strict adherence to common-law rules as are the true courts of the United States;[1] and, upon trials, they may properly be allowed to pursue a more liberal course in regard to the admission of testimony and the examination of witnesses than do, habitually, the civil tribunals.[2] Their purpose is to do justice; and if the effect of a technical rule is found to be to exclude material facts or otherwise obstruct a full investigation, the rule may and should be departed from. Proper occasions, however, for such departures will be exceptional and unfrequent.

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[1] Tytler, 352; Kennedy, xiii; Prendergast, 208; Maltby, 1; Macomb, 80.

[2] "Courts-martial, having cognizance only of criminal offences, are bound, in general, by the rules of evidence administered in criminal cases in the courts of common law; the only exceptions being those which are of necessity created by the nature of the service, and by the constitution of the court, and its course of proceeding." 3 Greenl. Ev. § 469, 476. "As no rules of evidence are specially prescribed by Congress for the observance of courts-martial, it must be deemed that such courts are contemplated to be governed, in general, by the same rules of evidence which govern the ordinary courts of criminal jurisdiction. These rules are supplied by the common law, excepting of course where otherwise provided by statute, in which case the latter prevail." Opinion of At. Gen. Brewster, in Whittaker's Case, March 17, 1882. 17 Opins., 311. "The rules of evidence, as established by a long line of decisions, are the only safe guides for the ascertainment of truth, and cannot safely be purposely disregarded by military courts." G. C. M. O. 6, Div. Atlantic, 1891. And to a similar effect, see Grant *v.* Gould, 2 H. Black., 69, 87; Lebanon *v.* Heath, 47 N. H., 359; People *v.* Van Allen, 55 N. Y., 39; 2 Opins. At. Gen., 344; 1 McArthur, 47; Warren, 8, 15; Harcourt, 76; Simmons § 811, 1006; Pipon & Col., 138; Hickman, 35; Kennedy, xiii–xvii, 120; Griffiths, 65; Prendergast, 206; Maltby, 2; O'Brien, 109; De Hart, 334, 405; Benét, 224; G. O. 51, Middle Dept., 1865; Do. 36, Fifth Mil. Dist., 1868; G. C. M. O, 60, Dept. of Texas, 1879; Do. 3, 52, Dept. of the East, 1880; DIGEST, 393.

That the rules of evidence are substantially the same in the criminal as in the civil procedure, see 1 Greenl. Ev. § 65; Wills, 73; U. S. *v.* Winchester, 2 McLean, 135; Brown *v.* Schock, 77 Pa. St., 471; G. O. 4, of 1843.

The subject of this Chapter will be presented under the separate heads of:—I. Proof in general; II. Admissibility of Evidence; III. Oral Testimony; IV. Written Testimony.

I. PROOF IN GENERAL.

Under this head will be noticed:—I. What is to be proved; II. How much is to be proved; III. What is to be presumed; IV. What is to be judicially taken notice of.

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[1] As the Court of Claims, for example, which, being *a court of the United States*, is held to be bound, in the absence of statutory provision on the subject, by the common-law rules of evidence. Moore *v.* U. S., 91 U. S., 270.

[2] Grant *v.* Gould, 2 H. Black., 104; Kennedy, 120; Tullock, 13; Bombay R., 19; Pratt, 198; Lieut. Col. Fremont's Trial, 239–40, 256. "Courts-martial had much better err on the side of liberality towards a prisoner than, by endeavoring to solve nice and technical refinements of the laws of evidence, assume the risk of injuriously denying him a proper latitude for defence." G. C. M. O. 32 of 1872. And, to a similar effect, see G. O. 104, Dept. of Dakota, 1871; Do. 23, Dept. of Texas, 1873; Do. 49, 60, Dept. of Cal., 1873; G. C. M. O. 60, Dept. of the Mo., 1874.

I. WHAT IS TO BE PROVED.

The Three Facts to be Established. Upon every criminal trial—military as well as civil—the burden is on the prosecution to establish guilt, not on the accused to establish his innocence. In the establishing of guilt, there are to be demonstrated three principal facts, viz.—That the act charged as an offence was really committed; That the accused committed it; That he committed it with the requisite criminal intent.

Proof of the commission. The *corpus delicti*[1] so called, or the fact that the alleged criminal act was committed—by some one,[2] is, as a separate fact to be proved, especially illustrated in cases of homicide and larceny, and—at military law—in cases of offences under Arts. 5, 8, 13, 14, 17, 22, 26, 45, 46, 58 and 60. Here the fact that a person has been unlawfully killed, that property has been unlawfully appropriated, that a false return or muster has been made, that arms, clothing, &c., have been sold or through neglect lost, &c., that a mutiny has occurred, that a challenge has been sent, that the enemy has been relieved, that a fraudulent claim has been advanced, &c., is a distinct fact to be established independently of the fact of the agency of the accused.

Proof of the agency and identity of the accused. This, as an independent fact, is especially material to be clearly shown where the offence was committed secretly or in the night time, or where the accused was a stranger to the witnesses, or was one of a number of persons associated together, or, (by reason of their similar dress or otherwise,) not readily distinguished from each other.[3] In the cases of some of the military offences, as desertion, cowardice, drunkenness on duty, sleeping on post, &c., the agency of the accused is so connected with the act done that proof of the latter is also proof of the former.

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[1] Proof of this first essential is not done away with by the fact that the accused has confessed the offence. In other words proof of a confession does not prove the *corpus delicti*, but the latter must be independently proved before evidence of the confession can be admitted. 1 Greenl. Ev. § 217; G. O. 234, Fifth Mil. Dist., 1869; Do. 5, 48, Dept. of the Platte, 1871.

[2] U. S. *v.* Searcy, 26 Fed., 435. The term *corpus delicti* is sometimes referred to as including not only the criminal act but also the agency of the accused therein. See Wharton, Cr. Ev. § 325, 633. The definition of the text, (and see 3 Greenl. Ev. § 30,) is, however, preferred.

[3] See case in G. O. 1, Dept. of the Platte, 1871, in which the proceedings were disapproved because the proof did not sufficiently connect the accused with the offence.

Proof of the intent. Crime, at common law, is made up of intent and act; the wrongfulness of the intent constituting the criminality of the act. To complete the legal crime, an intent to effect the wrong and an act performed in pursuance of such intent must concur, and without this combination there can be no crime.[1] And if the wrongful intent is present, the wrongful act committed is a complete crime, though it may not be the precise act had in view.[2] Where the intent is shared in by several persons, as in conspiracy, mutiny, &c., every one who has contributed to the intent, and at the same time engaged in the act, is criminal.[3]

In respect to the element of *intent*, crimes are distinguished as follows:—those in which a distinct and specific intent, independent of the mere act, is essential to constitute the offence; and those in which the act is the principal feature, the existence of the wrongful intent being simply inferable therefrom. Of the former are murder, larceny, burglary, desertion and mutiny; of the latter arson, rape, perjury, disobedience of orders, drunkenness on duty, neglect of duty.[4] In cases of the former class the characteristic intent must be established affirmatively as a separate fact; in the latter class of cases it is only necessary to prove the unlawful act, for every man is presumed in law to have intended to do what he actually does, and the burden of proof is upon him to show the contrary.[5] "When"—as observed by a U. S. Court[6]—"the proof shows that an unlawful act was done, the law presumes the intent, and proof of the act being a violation of law is proof of the intent."

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[1] 3 Greenl. Ev. § 13; 1 Bishop, C. L. § 285–287; U. S. *v.* Houghton, 14 Fed., 544.

[2] 1 Bishop, C. L. § 327–329.

[3] 1 Bishop, C. L. § 630, 636.

[4] "Neglect in the discharge of a duty, or indifference to consequences, is in many cases equivalent to a specific criminal intention." U. S. *v.* Thompson, 8 Sawyer, 122.

[5] 3 Greenl. Ev. § 13, 14.

[6] U. S. *v.* Baldridge, 11 Fed., 552.

Facts negativing intent. Under the head of the DEFENCE, in Chapter XVII, we have already considered certain facts and conditions, the effect of the proof of which is to negative the existence of the element of wrongful intent in alleged crime, or to show an incapacity to entertain such intent. These are such as Ignorance or mistake of fact, Ignorance of law, Drunkenness, Insanity, Compulsion by military orders or by hostile force, and Necessity of executing military discipline.

The subject of the *intent* will be further illustrated in considering the specific offences which form the subjects of the different Articles of war.

II. HOW MUCH IS TO BE PROVED.

Reasonable Doubt. In a civil action the plaintiff needs in general but to make out a *prima facie* case, or to offer evidence materially preponderating over that of the defendant, to give him the verdict or judgment. But the quantity of the proof required (on the part of the prosecution) is considerably greater upon criminal trials, where there exists always in favor of the accused the presumption of innocence—a presumption from which results the familiar rule of criminal evidence that, to authorize a conviction, the guilt of the accused must be established *beyond a reasonable doubt.* By "reasonable doubt" is intended not fanciful or ingenious doubt or conjecture, but substantial, honest, conscientious doubt, suggested by the material evidence in the case. "It is," as expressed by the court in a recent case,[1] "an honest, substantial misgiving, generated by insufficiency of proof. It is not a captious doubt, not a doubt suggested by the ingenuity of counsel or jury and unwarranted by the testimony; nor is it a doubt born of a merciful inclination to permit the defendant to escape conviction, nor prompted by sympathy for him or those connected with him." The meaning of the rule is that the proof must be such as to exclude, not every hypothesis or possibility of innocence, but any fair and rational hypothesis except that of guilt; what is required being not an absolute or mathematical but a "moral certainty."[2] A court-martial which acquits because, upon the evidence, the accused may *possibly* be innocent falls as far short of appreciating the proper *quantum* of proof required in a criminal trial, as does a court which convicts because the accused is *probably* guilty. However convincing the testimony, it is nearly always possible that the accused may be innocent: on the other hand, though the probabilities may favor his guilt, a material and sensible doubt of the same may exist, of which he is entitled to the benefit.

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[1] Woolson, J., in U. S. *v.* Newton, 52 Fed., 290.

[2] 3 Greenl. Ev. § 29; 1 Bishop, C. P. § 1093, 1094; Wharton, Cr. Ev. § 1; Wills, Cir. Ev., 157; U. S. *v.* Douglass, 2 Blatchford, 212; U. S *v.* Gleason, Woolworth, 128; U. S. *v.* Carr, 1 Woods, 486; U. S.

It is to be observed that the general rule indicated applies alike to each of the three main facts required to be made out upon a trial, in order to establish guilt, *viz.*—the *corpus delicti*, the identity of the accused with the real offender, and the requisite criminal *animus*. Each must be proved beyond a reasonable doubt.[1] The rule is equally applicable to military as to civil prosecutions.[2]

III. WHAT IS TO BE PRESUMED.

Presumption in General—Kinds of Presumption. It is observed by Bishop[3] that the whole law of evidence rests upon

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v. Babcock, 3 Dillon, 621; U. S. *v.* King, 34 Fed., 302; U. S. *v.* Hughes, Id., 734; U. S. *v.* Meagher, 37 Fed., 881; U. S. *v.* Means, 42 Fed., 559; Com. *v.* Webster, 5 Cush., 320; Com. *v.* Costley, 118 Mass., 21; Com. *v.* Drum, 58 Pa. St., 22; Meyer *v.* Com., 83 Id., 131; Com. *v.* Carey, 2 Brewst., 304; G. O. 27, Army of the Potomac, 1864; Do. 46, Dept. of the Mo., 1864; G. M. C. O. 67, Dept. of Cal., 1883; Manual, 71 § 42. And compare Coffin *v.* U. S., 156 U. S., 432; Cochran *v.* U. S., Id., 287.

In U. S. *v.* Babcock, (p. 621–2,) Dillon, J., well observes:—"The defendant, by the policy of our law, can neither be compelled nor permitted to testify. As a substitute for this deprivation, the law clothes the defendant with a presumption of innocence which attends and protects him until it is overcome by testimony which proves his guilt beyond a reasonable doubt." This was said in 1876. But the fact that the accused may now be permitted to testify cannot, it is believed, impair the initial legal presumption.

[1] "It is incumbent on the Government to prove beyond reasonable doubt the truth of every fact in the indictment necessary in point of law to constitute the offence." Curtis, J., in U. S. *v.* McGlue, 1 Curtis, 2. And see U. S. *v.* Wright, 16 Fed., 112; U. S. *v.* Newton, 52 Fed., 275.

[2] Courts-martial, being, as criminal courts, bound by the rules of criminal evidence, "ought not to convict the prisoner until all reasonable doubt of his guilt is removed; allowing the presumption of innocence, in all cases, to operate in his favor." 3 Greenl. Ev. § 469; G. C. M. O. 39, of 1889; Do. 18, 47, Div. Atlantic, 1886.

[3] 1 C. P. § 1096.

presumptions, and it has been said, by a distinguished English judge,[1] of *proof* itself that it is "nothing more than a presumption of the highest order."

Presumptions are most simply divided into *presumptions of law and presumptions of fact.*[2]

Presumptions of law. These are general propositions established by the law, which are accepted without evidence by the courts as being either "absolutely" or *prima facie* true, and have thus been distinguished as "conclusive" and "disputable."[3] *Conclusive* presumptions are inferences of the law in regard to which, as it is expressed by Greenleaf,[4] "all corroborating evidence is dispensed with and all opposing evidence is forbidden." Of these one of the most familiar is, that every sane person, who is a free agent, is "conclusively presumed to contemplate the natural and probable consequences of his own acts."[5] So, according to the earlier authorities, an infant under seven years is "conclusively presumed incapable" of committing a felony.[6] There is also the conclusive presumption, in favor of judicial proceedings, that the records of courts of justice have been correctly made up.[7] Among *disputable* presumptions, (where the inference, though more or less strong, is not absolute but may be overcome by counter evidence,[8]) are—the presumption in favor of the innocence of every person accused of crime;[1] the presumption in favor of the sanity of persons in general, and, on the other hand, the presumption that unsoundness of mind, (not accidental or temporary, as upon disease or drunkenness,) proved to have existed at a previous date, has continued;[2] the presumption of ownership arising from the open possession of property;[3] the presumptions as to public officers, that they are legally in office, and that they properly perform their official duties[4]—presumptions especially applicable to the military service.[5]

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[1] "Lord Erskine, in the Banbury Peerage Case." Wills, Circumstantial Evidence, 34.

[2] See, on this distinction, U. S. *v.* Searcy, 26 Fed., 437.

[3] 1 Greenl. Ev., 14. Some later writers do not approve this distinction, on the ground that few if any presumptions can be said to be absolutely conclusive. See the subject discussed in Wharton, Cr. Ev., Ch. XIV; also 1 Bishop, C. P. § 1099, 1100.

[4] 1 Greenl. Ev. § 15.

[5] 1 Greenl. Ev. § 18; 3 Id. § 14. "The law makes a man answerable for even the unexpected consequences of his crimes; and for this purpose imputes the intention to produce the consequence as well as the original act." State *v.* Cooper, 1 Green, 361. But see 1 Bishop, C. P. § 1100.

[6] 1 Greenl. Ev. § 28; 3 Id. § 4.

[7] 1 Greenl. Ev. § 19.

[8] "All presumptions as to matters of *fact*, capable of ocular or tangible proof, * * * are in their nature disputable. No conclusive character attaches to them. Presumptions are indulged to supply place of facts. When these appear, presumptions disappear." Field, J , in Lincoln *v.* French, 13 Fed., 48.

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[1] Warren, (p. 19,) says of this presumption: "It alone can guard against first impressions, prepossessions and prejudices." A further presumption may here be noted, that in favor of the character of a *witness* till impeached. Johnson *v.* State, 21 Ind., 329.

[2] Greenleaf, (1 Ev. § 42,) cites these two presumptions as illustrations of the more general one, that—"The opinions of individuals, once entertained and expressed, and the state of mind once proved to exist, are presumed to remain unchanged until the contrary appears." In Sleeper *v.* Van Middlesworth, 4 Denio, 431, the court designate this presumption as one "against any sudden change in the moral, as well as the mental and social, condition of man."

[3] 1 Greenl. Ev. § 34. "It is true that a presumption of ownership or title does arise from the possession of personalty; but it is the lowest form of presumption, and is subject to be rebutted by proof and the circumstances attending and surrounding the possession." Myers *v.* U. S., 24 Ct. Cl., 456.

[4] Griffith *v.* U. S., 22 Ct. Cl., 183. It is "a presumption that one who publicly performs official functions holds the office in fact; and no record or other like proof of his appointment is, in the first instance, required. * * * Official persons are presumed to have done their duty." 1 Bishop, C. P. § 1130, 1131. And see 1 Greenl. Ev. § 40, 83, 92, 195, 207.

There are also the presumptions, founded upon the course of official public business, that certain results will follow if certain conditions are complied with. Thus if a letter is shown to have been deposited prepaid and properly addressed in the post office, it may be presumed, in the absence of rebutting evidence, that it reached its destination and was received. In U. S. *v.* Babcock, 3 Dillon, 571, the court applied the same rule to telegraphic dispatches.

[5] Thus, on the trial of an officer or soldier, it is not necessary to produce the commission, or prove the official character or rank of the officer; or to produce the enlistment paper, or prove the formal enlistment of the soldier. It is sufficient to show that the officer has publicly acted and been recognized as such, and that the soldier has received pay or performed service as such. 3 Greenl. Ev. § 483; Lebanon *v.* Heath, 47 N. H., 359; O'Brien, 171. The rule of presumption of due appointment arising from the exercise of the office "would appear to apply with even more force to military than to civil officers." Jones *v.* Johnson, 24 Ark., 256, 260.

Presumptions of fact. These are simply inferences as to the existence of a fact derived from some other fact or facts, inferences not deduced by the law, but by the human reason. Varying with the circumstances of every case, they are not peculiar to judicial investigations, but illustrate the ordinary operations of the intellect in arriving at conclusions in general. Applied to criminal cases, they are inferences as to the fact of the guilt or innocence of the accused, deduced from minor facts and circumstances, physical and moral. They do not constitute or exemplify fixed legal principles, but "are in truth but mere arguments of which the major premise is not a rule of law."[1]

Inculpatory and exculpatory presumptions. Of this class are the "*inculpatory*" presumptions, derived from collateral circumstances and declarations indicating a motive for crime, from preparations for the commission of crime, from failure to account satisfactorily for suspicious appearances, from acts apparently exhibiting a criminal consciousness, (as concealment, disguise, or flight,) from the suppression, destruction, simulation, or fabrication of evidence, from attempts to prevent a fair trial, (as by endeavors to suborn or bribe witnesses, &c.,[2]) as well as from the numerous *physical* circumstances—such as impressions of foot-marks, blood on garments, possession of weapons or instruments likely to have been used in the commission of the crime, possession of property recently in the possession of the subject of the larceny, violence, &c.—which go to identify an accused as the guilty party. Of this class also are various presumptions similarly deduced but of an "*exculpatory*" character. Such are—the absence of apparent motive to commit the crime, the presence of a strong motive not to commit it, the fact of previous exemplary character, or of conduct and deportment not apparently reconcilable with guilt, the appearance of malice or falsehood on the part of the prosecuting witness, &c.[3]

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[1] 1 Greenl. Ev. § 44. And see Id. § 48.

[2] An unsuccessful attempt to establish an *alibi* has sometimes been cited as affording an inculpatory presumption against an accused; but in general probably such a failure should no more give rise to an unfavorable presumption than a failure to make out any other defence. See Miller *v.* People, 39 Ills., 457.

[3] See Wills, Cir. Ev., Ch. III, IV and V.

Presumptions and "circumstantial" evidence. The above are some of the presumptions of fact, which, in nearly every criminal case not established by direct testimony, combine, (for they rarely arise separately,) to induce the conclusion either of guilt or the reverse. And it is the various grounds of these presumptions, such as have been specified, which mainly constitute the material of *Circumstantial* as opposed to *Direct* evidence; the latter being the evidence, (comparatively rarely attainable in criminal trials,) of witnesses who testify from personal knowledge derived from the senses, as from seeing or hearing; the former the evidence furnished by the great variety of minor facts, circumstances and indications connected with or relating to the principal fact of the crime committed, and affording *presumptions*, more or less strong or weak, of the guilt or innocence of the accused.[1]

IV. WHAT IS TO BE JUDICIALLY TAKEN NOTICE OF.

We find further, in entering upon the subject of evidence, many facts of a conspicuous, general, or public character, which so authenticate themselves in law that the courts take judicial notice of their existence as matters of course, and which are not required either to be charged or proved. These, which have already been referred to in Chapter X, on the Charge, are such as —The laws of nations and of war, the provisions of the Constitution, public statutes and executive proclamations, the system and framework of the Government, the powers of the President and of the heads of the executive departments, matters of public history, the existence of a pending war,[2] the geographical features of the country;[3] and so of the ordinary meaning of words in our language,[4] &c. Military courts will also take notice of the existence and situation of military departments, reservations and posts, and will accept as authentic, without proof of their authority, the published "general" orders, circulars, and usually "special" orders, emanating from the War Department or Headquarters of the Army, or from the headquarters of the different military divisions and departments of the army.[1] So, inferior courts will properly take judicial notice of the formal published orders of the commander of the regiment or post. Facts within the common observation and knowledge of mankind will also be judicially taken notice of without proof by military equally as by civil tribunals.[2]

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[1] See 1 Greenl. Ev. § 13; Wills, Cir. Ev., 15, 16; U. S. *v.* Searcy, 26 Fed., 437.

[2] In Cuyler *v.* Terrill, 1 Abb., (U. S.,) 169, it was held that the U. S. courts would take judicial notice of the existence of the civil war of 1861–1865 and "also of particular acts which led to it, or happened during its continuance, whenever it becomes essential to the ends of justice to do so."

[3] 1 Greenl. Ev. § 5, 6; Wharton, Cr. Ev. § 308; La Vengeance, 3 Dall., 297; Furman *v.* Nichol, 8 Wallace, 44; Armstrong *v.* U. S., 13 Id., 154; Prize Cases, 2 Black, 635; Turner *v.* U. S., 21 Ct. Cl., 24.

[4] Nix *v.* Hedden, 149 U. S., 304.

II. ADMISSIBILITY OF EVIDENCE.

This subject will be considered under the following heads:—I. General rules governing the admission of testimony; II. Hearsay; III. Confessions; IV. Evidence excluded from considerations of public policy.

I. General Rules Governing the Admission of Testimony.

The Three Principal Rules. These, (which are the more directly illustrated by the testimony on the part of the *prosecution*,) may be stated as follows: 1. The evidence must be relevant; 2. The burden of proof of guilt is always on the government; 3. The best evidence must be produced of which the case is susceptible.

I. The evidence must be relevant. The testimony offered by the *prosecution*, whether oral or written, must be relevant, that is to say, must be apposite to the material averments of the indictment or charge and be such as to establish or tend to establish the commission of the offence alleged; otherwise, it may be objected to as "irrelevant" or "immaterial," and, upon such objection, will, in general, properly not be admitted by the court.[1] The testimony, to be admissible, need not indeed *directly* or *immediately* sustain the charge, provided it merely "constitutes a link in the chain of proof;"[2] and evidence offered which is seemingly irrelevant and is objected to as such may yet be admitted by the court, if persuaded by the representations of the party offering it that it will be rendered relevant by other testimony to be subsequently introduced.[3]

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[1] See G. O. 121, Second Mil. Dist., 1867. A *civil* court, however, will not take judicial notice, without proof, of the orders issued by a military department commander. Burke *v.* Miltenberger, 19 Wallace, 519.

[2] It is not necessary to prove facts which the jury may be presumed to know as well as any witness, or which are "within the ordinary observation of all men." Kraus *v.* R. R. Co., 55 Iowa, 338-9.

To be relevant, the evidence must be confined to the *issue* in the case; evidence as to the commission or attempted commission by the accused, at another time, of an offence quite independent of and distinct from that charged, though of the same sort, is in general irrelevant and inadmissible.[4] Where, however, two or more criminal acts or attempts have been committed by the accused at the same time, or as parts of the same transaction or system, evidence in regard to the one may be relevant as illustrating the commission of the other.[5] So, evidence of collateral facts—as declarations or acts of the accused, or an accomplice, made or done before, or even after, the commission of the offence charged—may sometimes be relevant and admissible as tending to prove *intent* or *guilty knowledge*.[1]

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[1] It need hardly be remarked that the exclusive authority to decide upon the relevancy of testimony, whether objected to by a party or by a member, rests with the Court. A witness, of whatever rank, on a military trial, has no authority to pass upon the relevancy or competency of his own evidence. In G. O. 1, Dept. of the South, 1869, Gen. Meade, in disapproving certain proceedings of a court-martial, comments as follows:—"The court, on the application of the defence, directed a witness" (an officer) "for the prosecution to produce a copy of a certain paper, which he refused to do on the ground that it was the business of the defence to produce the original. The witness thus assumed the functions of the court in deciding upon the relevancy of the evidence, and his refusal was disrespectful and a grave breach of discipline."

[2] 1 Greenl. Ev. § 51 *a*; Thompson *v.* Bowie, 4 Wallace, 471.

[3] 1 Greenl. Ev. § 51 *a*; U. S. *v.* Flowery, 1 Sprague, 109; G. O. 41, Dept. of the Platte, 1870. Such evidence is sometimes admitted, "subject to the proof to be given hereafter;" that is to say, subject to be accepted and retained, or rejected, in the end, according as subsequent testimony may or may not show it to be relevant. See Kelly *v.* Crawford, 5 Wallace, 790.

[4] The purpose of such testimony, as generally offered, *viz.* to raise an *inference* that the accused committed the similar act charged in the indictment, cannot be recognized as legitimate. See People *v.* Jones, 31 Cal., 565.

[5] 1 Greenl. Ev. § 52, 53; Wharton, Cr. Ev. § 32, 38, 49; Wills, Cir. Ev., 44; Manual, 65 § 21. The collateral offence must form "a link in the chain of circumstances or proof relied upon for conviction." Swan *v.* Com., 104 Pa. St., 218.

But though evidence, to be admissible, must tend to prove the issue, yet, except as to matters of essential description, it is relevant and sufficient if it supports only *substantially* the allegations of the charge.[2] Mere surplusage in the charge need not be noticed in the proof, and averments which are formal merely or immaterial need not be proved as laid. Thus the formal averment in an indictment for homicide, that the killing was done with a particular weapon, need not be verified by the evidence, but it will be enough to show that any other deadly weapon was employed.[3] So of the allegations of time, place, quantity, quality and value—the rule as to relevancy does not require strict proof;[4] and this especially in military cases, in view of the authority of courts-martial to except and substitute in their *findings*. As to time and place in military specifications, while *these* may sometimes require to be more precisely distinguished—*as* where a series of distinct offences of the same class are *alleged* to have been committed on separate days—it is in general *sufficient* if the time be shown to have been within the legal *period* of limitation,[5] and the place within the jurisdiction of the court, that is to say, within the United States.

The rule as to relevancy applies also to the *defence*. Whether testimony on the part of the accused is or not relevant must be determined by the nature of the defence in each case. In a military case, not only is such testimony relevant as goes to the gist of the particular defence, but also such as may establish good character or avail to extenuate the punishment in case of conviction.

Where irrelevant or immaterial testimony has been admitted in a case, but such testimony was manifestly such as could not have affected the finding or impaired the rights of the accused, the same should not be regarded as sufficient to induce a disapproval of finding or sentence.[1]

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[1] Manual, 66 § 22–25.

[2] 1 Greenl. Ev. § 56, 63.

[3] 1 Greenl. Ev. § 59.

[4] 1 Greenl. Ev. § 61.

[5] As to the rule in civil prosecutions, see McBryde *v.* State, 34 Ga., 203.

2. *The burden of proof of guilt is always on the prosecution.* It is a general rule of evidence that "the obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue."[2] And upon a criminal trial, where there stands at the threshold the presumption of the innocence of the accused, and the affirmative of the issue is thus necessarily asserted by the Government, the burden is imposed upon the prosecution of proving the existence of every material fact required to establish the offence charged. The *onus probandi* is not always confined to the proof of a proposition affirmative in form. The gist of the offence may be a criminal neglect,[3] and here the prosecution is called upon to prove a negative. This more frequently occurs in military than in civil cases, several of the Articles of war making punishable in terms the not doing of some duty incidental to the military status, or the doing of some act without the authority of the proper superior. One or the other of these negative elements may be perceived in offences designated in Arts. 7, 15, 16, 17, 23, 31, 32, 33, 34, 35, 40, 60, 67, 69; but it is the general charge laid under Art. 62, of "neglect of duty, to the prejudice of good order and military discipline," that most conspicuously illustrates the frequency of the obligation to prove a negative which is imposed upon the government in military cases. Yet the negative here is often but an affirmative in another form; the issue requiring the proving affirmatively of the commission of a specific act the doing of which is alleged to constitute the offence.

The burden of proof of guilt never shifts from the side of the prosecution. The accused may indeed admit the commission by him of the act charged, claiming that it did not constitute an offence on his part because of the existence of a certain fact which he sets up as a defence. Asserting this defence, the burden is upon him to maintain it. But the onus of proving *guilt* remains with the State, and if the accused so far makes out his defence as to involve the main issue in a reasonable doubt, the prosecution must dispel this doubt by further evidence, in order to obtain a conviction.[1]

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[1] See U. S. *v.* Jones, 32 Fed, 570.

[2] 1 Greenl. Ev. § 74.

[3] 1 Greenl. Ev. § 80.

3. The best evidence must be produced of which the case is susceptible. The rule that proof is to be made by the highest existing evidence is one of *quality*, not of *quantity*.[2] It does not require that the greatest amount of evidence should be accumulated for the proof of any fact, but only that every allegation should be established by the best, that is to say most authoritative and legally satisfactory, evidence of which the case is capable. But again the rule does not mean that indirect or circumstantial evidence, or evidence of less strength, is to be rejected where direct evidence or evidence of greater strength exists and may be produced; for indirect, weak, or imperfect evidence is equally admissible in law with direct, strong, or full evidence, provided only it be relevant. What is meant is that, where the evidence actually offered indicates of itself the existence of higher evidence for which it is clearly only a substitute, the substitutional evidence is incompetent and not to be admitted if objected to.[3]

The familiar application of the principle is to cases in which record evidence or other *written* evidence exists of a material fact which is attempted, in the course of the trial, to be established by *oral* testimony. Where such testimony, as offered, discloses the fact of the existence of the written proof which the law regards as of higher quality, (or where such fact has been disclosed by the pleadings or by previous testimony,) the secondary evidence may be objected to, and, upon objection, will properly be excluded.[1] Thus, in proving a charge of perjury or false swearing, committed at a military trial, the record of the trial is clearly the best evidence of the testimony given by the accused, and parol evidence of the same, unless introduced by consent, will be inadmissible.[2] The rule excluding the oral testimony in such cases is adopted not only because the writing must necessarily afford the most satisfactory evidence of the facts which it sets forth, but also, as Greenleaf observes, "for the prevention of fraud;" since, as he adds, "whenever it is apparent that better evidence is withheld, it is fair to presume that the party has some sinister motive for not producing it, and that, if offered, his design will be frustrated. The rule thus becomes essential to the pure administration of justice."[3]

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[1] See, in this connection, 1 Bishop, C. P. § 1050, 1051.

[2] See Manual, 71 § 41; Id., 73 § 44.

[3] "The rule of law is that the best evidence must be given of which the nature of the thing is capable; that is, that no evidence shall be received which presupposes greater evidence behind, in the party's possession or power." Marshall, C. J., in Tayloe *v.* Riggs, 1 Peters, 596. And see Ang.-Am., &c., Co. *v.* Cannon, 31 Fed., 313; 1 Greenl. Ev. § 82, 84; Manual, 68 § 30. The two sorts of evidence thus related are sometimes termed "primary" and "secondary." Even when secondary evidence is obliged to be furnished, it must be the best the party has it in his power to produce under the circumstances. Cornett *v.* Williams, 20 Wallace, 226. In a case of desertion, in G. C. M. O. 25, Dept. of the Mo., 1887, the proceedings and sentence were disapproved because the best evidence to prove the offence, though accessible to the prosecution, was not introduced.

But it may happen that oral testimony may be the original and best evidence as to a fact or facts when a statement of the same exists in writing. Thus where certain facts within the knowledge of the writer, and material to the issue in a case on trial, have been *recited* in an official endorsement, certificate, communication, or other writing, the primary and best evidence of such facts will be not the writing but the personal declaration of the same, under oath and subject to cross-examination, by the writer, and if he can be obtained as a witness, the written statement should not be received.[4]

Exceptions. To the general rule, however, there are certain exceptions, growing out of considerations of public policy and convenience, or out of the necessities or peculiar circumstances of the case. Thus public records and documents may be proved by *copy*, as will be hereafter indicated; though copies of writings which are not public records will be secondary and inadmissible.[1] A further exception has been admitted where the charge is to be proved out of voluminous or complicated accounts or similar documents, the introduction and inspection of which in court must be attended with great inconvenience, or entail unreasonable delay. Here an accountant or other competent person who has made the proper examination may be introduced to testify to the contents of the writings,[2] and schedules prepared and verified by him may also be admitted.[3]

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[1] That written *post orders* are not properly provable by parol, if it is practicable to produce them, see G. O. 60, Third Mil. Dist., 1867; Do. 11, Dept. of the South, 1869.

[2] See recent cases in G. C. M. O. 93, Dept. of the East, 1884, and in Do. 2, Dept. of the Mo., 1888, where the above paragraph is cited by Gen. Merritt.

[3] 1 Evidence § 82. And see U. S. *v.* Reyburn, 6 Peters, 367; Manual 68 § 30. "The withholding of the better evidence raises a presumption that, if produced, it might not operate in his favor." Tayloe *v.* Riggs, *ante.*

It is the duty of the court to see that the *best evidence* is procured if practicable, and where a witness, having important and material papers in his possession, refuses to appear and produce them, the court will properly call upon the judge advocate to *attach* him if necessary. See G. C. M. O. 32, Dept. of the Columbia, 1882.

[4] See G. O. 28, Dept. of the South, 1864; Do. 39, Dept. of the Susquehanna, 1864; Do. 45, Dept. of the East, 1872.

Lost or destroyed writing. An occasion for the substitution of secondary evidence is also presented where a material writing has been *lost* or *destroyed*.[4] A party proposing to prove by secondary evidence a writing which has been *lost*, must properly first offer some evidence that a paper of the character has existed, and that a "*bona fide* and diligent search has been unsuccessfully made for it in the place where it was most likely to be found, if the nature of the case admits of such proof."[1] Where the paper was lost out of the party's own custody, his affidavit as to the fact and circumstances of the loss may be offered,[2] or he may be allowed to be sworn to the fact in court.[3] Where the paper has been *destroyed*, the fact of its previous existence and of the circumstances of its destruction must be shown,—(and the affidavit, or statement on oath before the court, of the party, is admissible, if the facts rest in his knowledge alone,)—before secondary evidence of its contents can become competent.[4]

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[1] Ang.-Am., &c., Co, *v.* Cannon, 31 Fed., 313.

[2] 1 Greenl. Ev. § 93.

[3] R. R. Co. *v.* Dana, 1 Gray, 83. Greenleaf, (vol. 1 § 94,) adds:—"Under this head may be mentioned the case of inscriptions, on walls and fixed tables, mural monuments, gravestones, surveyors' marks on boundary trees, &c., which, as they cannot conveniently be produced in court, may be proved by secondary evidence." Otherwise, where things of this nature can be conveniently brought into court; as a *printed notice*, not affixed to the freehold but merely hung up in an office. Jones *v.* Tarlton, 1 Dow, P. C. (N. S.) 625.

[4] "Secondary evidence of the contents of written instruments is admissible wherever it appears that the original is destroyed or lost, by accident, without any fault of the party offering the evidence." Remer *v.* Bk. of Columbia, 9 Wheaton, 581. And see U. S. *v.* Reyburn, 6 Peters, 365; U. S. *v.* Laub, 12 Peters, 1; Williams *v.* U. S., 1 Howard, 290. In U. S. *v.* Lyon, 2 Cranch C., 309, the court refused to receive parol evidence of the contents of a written *challenge*, in the absence of evidence that the same had been lost or destroyed.

In the recent case of Magie *v.* Herman, 50 Min., 424, it has been held that a person, in transmitting a communication by telegraph, "makes the Telegraph Company his agent, and the transcribed message actually delivered is *primary evidence;* and if lost or destroyed its contents may be proved by parol." That the written message delivered to the receiver is the original, see Brewing Asstn. *v.* Hutmacher, 127 Ills., 652.

Paper in adverse possession—Notice to produce. A further instance in which secondary testimony as to a writing may be introduced in lieu of the writing itself is presented where the paper or document desired to be put in evidence is *in the possession or under the control of the adverse party.*[5] For the admission of such testimony a foundation must be laid, by the party proposing to avail himself of the evidence, by a showing on his part that he has done all that the law requires of him to induce the production of the original. What the law requires is, that he shall first give a notice to the adverse party, (or his attorney,) to produce the original in court, to be admitted and used in evidence.[1] The notice should generally be in writing, and should clearly describe the paper or document called for, so that it cannot be mistaken.[2] It should ordinarily be served, if practicable, before the trial, so that there may be ample opportunity for complying with it:[3] if the occasion, however, for using the evidence does not arise till during the progress of the trial, the notice may be served at that time, and, unless required by the adverse party to be in writing, may be given verbally in the presence of the court.[4]

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[1] 1 Greenl. Ev. § 558. Slight evidence of the previous *existence* of the paper is sufficient. Id. § 349, 558. "It seems that in general the party is expected to show that he has in good faith exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest and which were accessible to him." Id. § 558. And see Kelsey *v.* Hanmer, 18 Com., 311; Foster *v.* McKay, 7 Met., 531.

[2] 1 Greenl. Ev., 349, 558; Foster *v.* McKay, *ante;* Allen *v.* Blunt, 2 Wood. & Minot, 121; Maye *v.* Carberry, 2 Cranch C., 336.

[3] Fitch *v.* Bogue, 19 Conn., 285; Vedder *v.* Wilkins, 5 Denio, 64. The statement of the accused, when thus presented, is not in the nature of the testimony of a witness to the merits of the case, but formal and preliminary merely and addressed to the discretion of the court,—as in the instance of the swearing by a party to his having given notice to produce papers, (see *post,*) or to an affidavit for a continuance to procure testimony.

[4] See authorities cited in the two preceding notes; also Pillow's Case, (Court of Inquiry,) p. 30–31. Upon the waiver of the opposite party, the simple statement of a party as to the fact of loss or destruction, (unaccompanied by his oath,) may be accepted by the court, in its discretion, as sufficient.

[5] "If papers are in the possession of the opposite party, due notice for their production should be given; after which, if not produced, secondary evidence may be given of their contents." Simmons § 1035.

The proper time for calling for the *production* of writings, to produce which notice has been given, is held to be—"not until the party who requires them has entered upon his case."[5]

It has been held by a United States Court that books and papers produced under notice must be allowed to be used by the other side *unconditionally;* else parol evidence of their contents may be given.[6]

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[1] 1 Greenl. Ev. § 560, 562; U. S. *v.* Winchester, 2 McLean, 135; Allen *v.* Blunt, 2 Wood. & Minot, 121; Maye *v.* Carberry, 2 Cranch C., 336; Underwood *v.* Huddlestone, Id., 76. The party must not only give notice to produce, but must prove the existence of the original, and must show that the instrument is in the hands or power of the opposite party. That it is so, "very slight evidence will raise a sufficient presumption," where the instrument belongs to him, or has been or should regularly be in his possession, or in that of his agent or other person in privity with him. 1 Greenl. Ev. § 560, note.

The fact that the adverse party or his attorney actually has the paper in court does not dispense with the usual notice. See 1 Greenl. Ev. § 561, note.

[2] 1 Greenl. Ev. § 562; Rogers *v.* Custance, 2 M. & Rob., 179; Jacob *v.* Lee, Id., 33.

[3] See 1 Greenl. Ev. § 562; Choteau *v.* Raitt, 20 Ohio, 132; Emerson *v.* Fisk, 6 Greenl., 200.

[4] See Smith *v.* Young, 1 Campb., 440. A voluntary offer by the adverse party to produce the paper is a waiver of notice. Dwinell *v.* Larrabee, 38 Maine, 464.

If it becomes necessary to *prove* the fact that notice was given, this may be done by the affidavit, or statement in court under oath, of the party, or of his counsel or other person through whom it was communicated or served.

[5] "Until which time the other party may refuse to produce them, and no cross-examination as to their contents is usually permitted." 1 Greenl. Ev. § 563. It may be noted here that it is held that, after notice and refusal to produce a paper, and secondary evidence thereupon given of its contents, the adverse party cannot be permitted to produce it in evidence as part of his own case. Doe *v.* Hodgson, 12 Ad. & El., 135.

[6] Carr *v.* Gale, 3 Wood. & Minot, 38.

II. HEARSAY.

Rule of Exclusion. Intimately connected with the rule last considered, requiring the production of the "best evidence," is that which excludes the species of secondary evidence known as *hearsay*. "The term 'hearsay,'" says Greenleaf,[1] "is used with reference to that which is written as well as to that which is spoken; and, in its legal sense, it denotes that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also, in part, on the veracity and competency of some other person." Such evidence, in the words of Chief Justice Marshall,[2] "is incompetent to establish any specific fact which is in its nature susceptible of being proved by witnesses who speak from their own knowledge." This kind of testimony is uniformly held inadmissible, not only on account of its intrinsic uncertainty growing out of the fact that it consists of matter repeated at second hand at least, as well as because it presumes the existence of better testimony and because it may serve as a cover to fraud and perjury, but especially because it introduces into the case statements not made under oath, and the truth of which cannot be tested by the criterion of cross-examination.[3]

Hearsay Distinguished from Original Testimony. It is to be noticed that the statements of a third person are not always hearsay, but may constitute original facts, as properly admissible as any other original testimony. Thus where a question at issue in the case is whether certain words were actually spoken (or written) by a person other than the witness, or whether a certain confession or admission was made by such person, a recital by the witness of the words or terms employed is original testimony, and an objection to its admission should be overruled. So, in a military case, where the question is whether a certain order of a superior which the accused is charged with disobeying was actually given, a witness other than such superior may be admitted to testify as to the facts and terms of the order.[1]

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[1] 1 Evidence § 99. And see Manual, 73 § 46, 77 § 59.

[2] Queen *v.* Hepburn, 7 Cranch, 295, reaffirmed in Hopt *v.* Utah, 110 U. S., 574.

[3] In Merritt *v.* Mayor, 5 Cold., 95, it was remarked by the court that —"the declarations and conversations of *military officers* are not exempted from the common rules of evidence, but are mere hearsay and excluded as those of ordinary citizens." Otherwise, of course, where they are a part of the *res gestæ*. See *post*. The introduction of mere hearsay evidence by courts-martial has been repeatedly disapproved by reviewing officers. See instances in G. O. 118, Dept. of the East, 1870; Do. 34, Dept. of Dakota, 1874. In a recent case in G. C. M. O. 14, Dept. of the East, 1894, the proceedings are disapproved "in so far as they show remarks made by the judge advocate to the court as to the statements of witnesses who had been examined by him before the trial and who were not called to testify. Remarks of such a character," it is added, "are inadmissible. When information is desired from persons not before the court, they should be regularly called and duly sworn to set forth facts within their knowledge."

Res Gestæ. Other declarations of third persons which are admitted in evidence as being not hearsay, but original testimony, are those which fall within the class of the "*res gestæ*," as the legal phrase is. By the *res gestæ* is meant the circumstances and occurrences attending and contemporaneous with the principal fact at issue, or so nearly contemporaneous with it as to constitute a part of the same general transaction, which explain and elucidate such fact by indicating its nature, motive, purpose, &c.[2] Such are threats or declarations of the accused in connection with his commission of the crime charged and indicating his intent or knowledge; declarations or exclamations of the party injured, relating to the violence committed, going to indicate its nature, by whom committed, &c.; language of accomplices; cries of bystanders in concert with the accused or party assailed by him; declarations of *agents* in regard to pending transactions, &c.:—all such may be established by the testimony of persons present who heard the utterances, &c. Other circumstances admissible in evidence as of the nature of *res gestæ* would be the words and acts of third persons—seconds for example—which go to indicate whether a certain communication is a challenge to fight a duel, or an acceptance of a challenge, in violation of the 26th Article of war.

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[1] So, where the question is, whether the party acted prudently, wisely, or in good faith, the *information* on which he acted, whether true or false, is original evidence. 1 Greenl. Ev. § 101. The rule, it may be noted here, "does not exclude evidence as to statements made in the presence of the prisoner." Manual, 74 § 48.

[2] Beaver *v.* Taylor, 1 Wallace, 642; U. S. *v.* Roudenbush, Baldwin, 514; State *v.* Keene, 50 Mo., 357; Blount *v.* State, 49 Ala., 381; Head *v.* State, 44 Miss., 731; Wharton, Cr. Ev. § 263. Declarations offered in evidence as *res gestæ* must be shown to be voluntary and spontaneous, and made so near in time to the principal transaction as to preclude the idea of deliberate design. People *v.* Vernon, 35 Cal., 49.

Exception to Rule excluding Hearsay—***Dying declarations in cases of homicide.*** Under indictments for murder and manslaughter, the law recognizes an exception to the rule rejecting hearsay, by allowing the dying declarations of the victim of the crime, in regard to the circumstances which have induced his present condition, and especially as to the person by whom the violence was committed, to be detailed in evidence by one who has heard them.[1] It is necessary, however, to the competency of testimony of this character—and it must be proved as preliminary to the proof of the declaration[2]—that the person whose words are repeated by the witness should have been *in extremis* and under a sense of impending death, *i. e.* in the belief that he is about or soon to die;[3] though it is not necessary that he should himself *state* that he speaks under this impression, provided the fact is otherwise shown.[4] And if this belief on his part sufficiently appears, it is not essential to the admissibility of his words that death should have immediately followed upon them.[5] On the other hand if, in uttering the words, he was under the impression that he should recover, the same would be inadmissible even if in fact he presently died.[6] But it is no objection to their admissibility that they were brought out in answer to leading questions,[7] or upon urgent solicitations addressed to him by any person or persons;[1] and if, instead of speaking, he answered the questions by intelligible signs, these signs may equally be testified to.[2] But it is held that only such declarations are admissible as would be admitted if the party were himself a witness; so that where the language employed is irrelevant or consists in a statement of *opinion* instead of fact, it cannot be received.[3] Nor can it be received unless complete in itself; as where the declaration is left incomplete and uncertain because interrupted by death.[4] If it was put in writing at the time, the writing should be produced.[5] Dying declarations are admissible as well in favor of the accused as against him.[6]

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[1] "As the testimony of an accomplice is admissible against his fellows, the dying declarations of a *particeps criminis* in an act which resulted in his own death are admissible against one indicted for the same murder." 1 Greenl. Ev. § 157. So the dying declarations of a third person, mortally wounded by the same shot that killed the deceased, are admissible in evidence against the person charged with the homicide of the latter." State *v.* Wilson, 23 La. An., 558.

[2] Kelly *v.* U. S., 27 Fed., 616.

[3] "The persons whose declarations are thus admitted are considered as standing in the same situation as if they were sworn; the danger of impending death being equivalent to the sanction of an oath." 1 Greenl. Ev. § 157.

[4] 1 Greenl. Ev. § 158; People *v.* Sanchez, 24 Cal., 17; Wills *v.* State, 74 Ala., 21.

[5] See Rakes *v.* People, 2 Neb., 157.

[6] See 1 Greenl. Ev. § 158.

[7] The statement, as to its admissibility, is to be governed by the same rules as other testimony, except only that it may be elicited by leading questions. People *v.* Sanchez, 24 Cal., 17.

It is to be remarked that evidence of dying declarations, made as such usually are under circumstances of mental and physical depreciation, and without being subjected to the ordinary legal tests, is generally to be received with great caution.[7]

III. CONFESSIONS.[8]

Different Kinds of Confession. Confessions are said to be *judicial* or *extra-judicial.* The former are those made in court, as by the plea of guilty; the latter are all those which are made elsewhere than in court. They are also *express*, as when made by the accused in specific terms either orally or in writing; or

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[1] 1 Greenl. Ev. § 161 *a*; Vass' Case, 3 Leigh, 852.

[2] 1 Greenl. Ev. § 161 *b*; Com. *v.* Casey, 11 Cush., 417.

[3] Binns *v.* State, 46 Ind., 311; State *v.* Quick, 15 Rich., 342; U. S. *v.* Veitch, 1 Cranch C., 115; 1 Greenl. Ev. § 159.

[4] 1 Greenl. Ev. § 161 *a*; Vass' Case, 3 Leigh, 786.

[5] As being the "best evidence." State *v.* Cameron, 2 Chand., 172.

[6] Mattox *v.* U. S., 146 U. S., 140.

[7] 1 Greenl. Ev. § 162; Manual, 74 § 49. In Murphy *v.* State, 37 Ill., 447, the dying person was under the influence of morphine and had to be aroused to get his statement out. In People *v.* Knapp, Edmonds, 177, it is noticed that the evidence is especially unsatisfactory where it appears that the deceased was a person of bad character who might, in his declaration, have charged the accused with the crime through motives of hostility and revenge.

[8] The subject of Admissions, as distinguished from that of Confessions, pertains rather to civil suits than to criminal proceedings. It is enough to note here that all facts admitted by either party, or obviously assumed on the trial, are to be regarded as being as much in the case as if they had been expressly proved. See Kennedy, 172; Paige *v.* Fazackerly, 36 Barb., 392.

implied, as where they are deduced from his silent acquiescence in statements in regard to his alleged offence, made in his presence by others, when there is nothing to prevent his contradicting, qualifying, or otherwise replying to, such statements.[1] But of course the evidence of such acquiescence must be very clear and positive to assign to it the efficacy of a confession.[2]

Admissibility of Confessions. As to the requisites to the admission in evidence of *extra-judicial* confessions—it has been seen, in the first place, that a confession cannot be admitted in evidence till the *corpus delicti*—the fact that the alleged criminal act was in fact committed, by somebody—is proved.[3]

In the second place, it is held that a confession, to be admitted, must be offered in its *entirety*, so that the whole may be taken together, and the complete purport may fully appear. If a material part is withheld the part offered should not be admitted.[4] A judge advocate upon a military trial may desire to keep out of sight a portion of a confession because it implicates parties other than the accused; but this is a reason not recognized as sufficient at law, since a confession is not evidence against any person (not an accomplice) other than the one who makes it.[5] So, the judge advocate may prefer not to discover a certain portion of the confession, on the ground that it is erroneous and unsatisfactory; but this also is not a sufficient reason, since he is at liberty to contradict such portion by other evidence.[6] He must, therefore,

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[1] See 1 Greenl. Ev. § 215; Wharton, Cr. Ev. § 680; Kelley *v.* People, 55 N. Y., 565; G. O. 48, Dept. of the Platte, 1871.

[2] The mere fact, for example, that the accused remains silent *when questioned* as to the offence committed, is not to be regarded as equivalent to a confession in law. See Campbell *v.* State, 55 Ala., 80; DIGEST, 258. In Marvin *v.* Dutcher, 26 Min., 391, it is held that where it is not the *duty* of a person to speak as to the existence of an alleged fact, his silence cannot be taken as an admission against him.

[3] See *ante*—"What is to be proved;" also G. C. M. O. 8, Dept. of Arizona, 1892.

[4] 1 Greenl. Ev. § 217; U. S. *v.* Wilson, Baldwin, 78. G. O. 48, Dept. of the Platte, 1871. "If a confession is given in evidence, the whole of it must be given, and not merely the parts disadvantageous to the accused person." Manual, 81 § 80.

[5] The mere fact that two persons are charged and tried *jointly* does not render a confession made by one admissible in evidence against the other. State *v.* Weesel, 30 La. An., 919.

[6] U. S. *v.* Long, 30 Fed., 678.

(unless objection is waived,) introduce the entire confession or wholly withhold it.

But the most familiar requisite to the admissibility of a confession is that it must have been *voluntary*;[1] and the *onus* to show that it was such is upon the prosecution in offering it.[2] A confession is, in a legal sense, "voluntary" when it is not induced or materially influenced by hope of release or other benefit, or fear of punishment or injury, inspired by one in authority; or, more specifically, where it is not induced or influenced by words or acts,—such as promises, assurances, threats, harsh treatment, or the like,—on the part of an official or other person competent to effectuate what is promised, threatened, &c., or at least believed to be thus competent by the party confessing.[3] And the reason of the rule is that where the confession is *not* thus voluntary, there is always ground to believe that it may not be *true*.[4]

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[1] U. S. *v.* Pumphreys, 1 Cranch C. C., 74; U. S. *v.* Hunter, Id., 317; U. S. *v.* Charles, 2 Id., 76; U. S. *v.* Pocklington, Id., 292; U. S. *v.* Nott, 1 McLean, 499; Hopt *v.* Utah, 110 U. S., 575; Com. *v.* Myers, 160 Mass., 530; Lefevre *v.* State, 50 Ohio, 584; State *v.* Drake, 113 No. Ca., 624; Gallagher *v.* State, 24 S. W., 288; Collins *v.* Com., 25 S. W., 743; May *v.* State, 38 Neb., 211; Goodwin *v.* State, 15 So., 571; Regina *v.* Thompson, 2 Q. B., 12, (1893.)

[2] Nicholson *v.* State, 38 Md., 140, and cases referred to in last note. See also the principle illustrated in military cases published in the following Orders: G. C. M. O. 3 of 1876; G. O. 31. Dept. of Florida, 1865; Do. 54, Dept. of Dakota, 1867; Do. 5, Fifth Mil. Dist., 1868; Do. 48, Dept. of the Platte, 1871, G. C. M. O. 16, Div. of the Pacific & Dept. of Cal., 1881. "The course of practice is to inquire of the witness whether the prisoner had been told that it would be better for him to confess, or worse if he did not; or words to that effect." G. O. 48, Dept. of the Platte, 1871.

[3] "Of course such inducement must be held out by some one who has, or who is supposed by the accused to have, some power or authority to assure him the promised good, or cause or influence the threatened injury." Shaw C. J., in Com. *v.* Morey, 1 Gray, 461. And see Com. *v.* Taylor, 5 Cush., 610; U. S. *v.* Pocklington, 2 Cranch C., 293; Cady *v.* State, 44 Miss., 332; Joy on Confessions, 5, 23; 1 Greenl. Ev. § 222; Wharton, Cr. Ev. § 650, 651; Manual, 80, 81; G. C. M. O. 16, Div. of the Pacific & Dept. of Cal., 1881.

It is held that though influences may have been used that *per se* would render a confession incompetent, the same may be admitted in evidence if it is shown that the effect of such influences was in fact entirely dispelled before the confession was actually made. See 1 Greenl. Ev. § 221; State *v.* Guild, 5 Halst., 180; People *v.* Jim Ti, 32 Cal., 60; Manual, 81 § 77.

[4] 1 Greenl. Ev. § 231; People *v.* Ah Ki, 20 Cal., 177. But where a

Though confessions are in the majority of cases made to officials holding the party in confinement or arrest, the mere fact that he is in custody at the time of making the confession does not stamp it as involuntary.[1]

But the confession, though it must have been voluntary, need not have been *spontaneous*. It will be admissible though induced by the exhortations of a spiritual adviser, by appeals to the accused founded upon the claims of justice, the rights of other persons whose safety or interests are involved in his declaring the truth, &c., or by any other influence "collateral to the proceedings" and not such as to induce a substantial hope of favor or fear of punishment.[2] So it will be admissible though elicited by questions addressed directly to the accused by a person in authority and assuming his guilt, or by means of making him partially intoxicated,[3] or by practicing upon him some deception by which he is entrapped into confessing.[4]

In *military* cases, in view of the authority and influence of superior rank, confessions made by inferiors, especially when ignorant or inexperienced and held in confinement or close arrest, should be regarded as incompetent unless very clearly shown not to have been unduly influenced. Statements, by way of confession, made by an inferior under charges to a commanding officer,

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confession induced by a promise, &c., is shown not to have been false by the fact that property confessed to have been stolen is surrendered, or its place of concealment truly disclosed, the confession, or rather the fact which accompanied it or was discovered in consequence of it, is admissible in evidence against the accused. U. S. *v.* Hunter, 1 Cranch C., 317; U. S. *v.* Richard, 2 Id., 439; Frederick *v.* State, 3 West Va., 695; People *v.* Ah Ki, *ante*. "Facts discovered in consequence of a confession improperly obtained, and so much of the confession as distinctly relates to those facts, may be proved." Manual, 81.

[1] Wharton, Cr. Ev. § 672; Wiley *v.* State, 3 Cold., 362; Com. *v.* Hanlon, 3 Brewst., 461; Hopt *v.* Utah, 110, 575.

[2] 1 Greenl. Ev. § 229; Manual, 80 § 76; Frank *v.* State, 39 Miss., 705.

[3] 1 Greenl. Ev. § 229; Wharton, Cr. Ev. § 676; Manual, 81 § 79; People *v.* Ramirez, 56 Cal., 533. But the confession of a person who is too much intoxicated to be responsible for his statements is not competent evidence. See G. O. 234, Fifth Mil. Dist., 1869.

[4] "Provided there is no reason to suppose that the inducement held out was calculated to produce any untrue confession, which is the main point to be considered." 1 Greenl. Ev. § 229. And see Manual, 81 § 79; also, as very full on this general branch of the subject of justifiable inducements, &c., Wharton, Cr. Ev. § 647, 648, 654, 655, 657, 659, 660, 663, 670, 675, 676.

judge advocate, or other superior whom the accused could reasonably believe capable of making good his words, upon even a slight assurance of relief or benefit by such superior, should not in general be admitted. Thus in a case where a confession was made to his captain by a soldier upon being told by the former that "matters would be easier for him," or "as easy as possible," if he confessed, such confession was held not to have been voluntary and therefore improperly admitted.[1] And it has been similarly ruled in cases of confessions made by soldiers, upon assurances held out, or intimidation resorted to, by non-commissioned officers.[2]

These principles are equally applicable to a *written* as to a verbal confession. But it is to be remarked that where, (as is often the case when it has been drawn up by another person,) a written confession specifies that the statement is freely made, without hope of favor or advantage, or fear of injurious consequence, (or in words to that effect,) the inquiry as to whether it was *in fact* voluntary is in no manner precluded.[3] But a confession, written or verbal, may always be *confirmed* by evidence going to establish its truth and to prove that it has not been fabricated.[4]

Confessions of Accomplices. Applying here the general principle attaching to conspiracies and concerted crimes, it may be remarked that, a conspiracy or combination having once been proved, a confession by one conspirator or accomplice, provided it relate to the matter of the intended or pending criminal transaction, and be made before the purpose of the association has been accomplished, is admissible in evidence against any other conspirator or accomplice.[5]

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[1] G. C. M. O. 16, Div. of the Pacific & Dept. of Cal., 1881.

[2] G. C. M. O. 3 of 1876; G. O. 54, Dept. of Dakota, 1867. And see instance reported in DIGEST, 397–8.

[3] In a case in G. O. 11, Army of the Potomac, 1864, the proceedings were disapproved because the court would not allow the accused to show that he had signed a written confession without knowing its contents and upon false representations made to him as to the same.

[4] See 1 Greenl. Ev. § 231. So a confession may be contradicted, as to any part of it, by evidence offered by the prosecution. G. O. 48, Dept. of the Platte, 1871.

[5] See 1 Greenl. Ev. § 233; U. S. *v.* White, 5 Cranch C., 39; Logan *v.* U. S., 144 U. S., 263. But note also citation from State *v.* Weesel, 30 La. An., 919, *ante*.

Confessions to be Received with Caution. In view of the peculiar conditions of mind and body under which accused persons are often placed when making confessions, of the liability to mistake on the part of the witnesses who repeat them when oral, and of the tendency of these latter to exaggerate through a zeal for conviction,—evidence of confessions, unless corroborated by other reliable evidence, is in general to be received with caution. Where, however, a confession is explicit and deliberate as well as voluntary, and, if oral, is proved by a witness or witnesses by whom it has not been misunderstood and is not misrepresented, it is indeed one of the strongest forms of proof known to the law.[1]

IV. EVIDENCE EXCLUDED FROM CONSIDERATIONS OF PUBLIC POLICY.

State Papers, Public Documents, &c. Under this head is to be noted—first—confidential archives and "secrets of state," pertaining to the administration of the government, the disclosure of which would be prejudicial to the public interest.[2] Of this kind of evidence would be the papers and documents belonging to the archives of the Executive Departments at Washington, containing the correspondence of public officials and agents with the Government, reports of investigations and other official communications made, in the line of duty, by officers of the army or navy to their military or naval superiors,[3] and records of advisory boards and courts of inquiry.[4] Such papers are esteemed of so

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[1] 1 Greenl. Ev. § 214, 215; U. S. *v.* Nott, 1 McLean, 499; State *v.* Long, 1 Hayw., 524; Lehman *v.* McQueen, 65 Ala., 570; Whiteside *v.* State, 4 Cold., 175; G. C. M. O. 3 of 1876; G. O. 48, Dept. of the Platte, 1871; Do. 46, Div. of the Atlantic, 1874.

[2] 1 Greenl. Ev. § 250; DIGEST, 543–544.

[3] In the matter of Mason, U. S. Circ. Ct., No. Dist. N. Y., October, 1882; Hopper *v.* Field, U. S. Circ. Ct., E. Dist. Pa., October, 1886.

[4] In Home *v.* Bentinck, 2 Brod. & Bing., in holding that the record of a certain military court of inquiry had been properly rejected as evidence upon objection raised at the trial, the court say, (p. 163,)—"On the broad rule of public policy and convenience, these matters, secret in their natures, and involving delicate enquiry and the names of persons, stand protected." In our law, "the proceedings of a court of inquiry may be admitted as evidence by a court-martial," in cases and under the circumstances specified in the 121st Article of war. As to the admission in evidence of records of courts-martial, see *post*, under "Written Testimony."

privileged a character that heads of departments or others in whose legal custody they are,[1] cannot in general be required to furnish the same, (or copies,) to be produced in court, if it be determined by them not to be for the public interest that their contents should be disclosed; nor, if furnished, will the courts in general admit them if objected to.[2] The courts appear to have recognized an exception to this rule only in a case of an official communication proved to have been made *maliciously and without due cause.*[3]

Names, &c., of Persons employed in Criminal Investigations. A like consideration—that it is important to the interests of the community in connection with the due administration of penal justice, as well as to the protection of the persons themselves, that public agents or others employed in the investigation of crime should not be known—excludes testimony which would make public the names of such persons, or their operations or the information on which they have proceeded, except in so far as strict justice to the accused may render necessary.[4]

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[1] As to the routine official papers of the War Department, not in general claimed to be privileged, of which copies for use in evidence are ordinarily furnished, see DIGEST, 543–4.

[2] Home *v.* Ld. Bentinck, 2 Brod. & Bing., 130; Beatson *v.* Skene, 5 Hurl. & Nor., 837; Dawkins *v.* Ld. Paulet, 5 Q. B., 94; Dawkins *v.* Rokeby, 8 Id., 255; Dickson *v.* Earl of Wilton, 1 Fost. & Fin., 419; Gardner *v.* Anderson, 22 Int. Rev. Rec. 41; Maurice *v.* Worden, 54 Md., 233; 11 Opins. At. Gen., 142; 15 Id., 378, 415; Wharton, Cr. Ev. § 513; 1 Greenl. Ev. § 251; Manual, 84, § 94. Where the custodian declines to produce the paper on grounds of public policy, *secondary* evidence of its contents will not in general be received by the court. Maurice *v.* Worden, 54 Md., 233.

[3] See Maurice *v.* Worden. 54 Md., 233. This was an action for libel based upon an official endorsement made by the defendant as Superintendent of the Naval Academy, in forwarding the resignation of the plaintiff, as an assistant professor, to the Secretary of the Navy. A copy of the endorsement, furnished to the plaintiff by the Navy Department, being offered in evidence, was objected to by the defendant on the ground that the writing was a privileged communication. The Court held it "to be privileged to the extent that the occasion of making it rebuts the presumption of malice, and throws upon the plaintiff the *onus* of proving that it was not made from duty, but from actual malice and without reasonable and probable cause."

[4] 1 Greenl. Ev. § 250; Rex *v.* Hardy, 24 How., S. T., 753; Rex *v.* Watson, 2 Stark, 119; U. S. *v.* Moses, 4 Wash., C., 726; Manual, 85 § 97.

Thus a military officer, directed by an authorized superior to investigate a case of supposed dereliction and make report, cannot properly be required, as a witness before a court-martial, to disclose either the conclusions of his report, or the names of the persons from whom information was obtained by him or their statements.

Professional Communications. Under the present head is also properly considered evidence of professional communications, that is to say declarations and statements, verbal or written, made to a legal adviser. These are protected from disclosure on grounds of public policy, and cannot be admitted in evidence if excepted to by the accused party by whom they were made.[1] Thus if an accused, in the course of his communications to his counsel, shall have disclosed the commission of, or participation in, by him, of the criminal offence with which he is charged, the counsel cannot be interrogated or required to testify as to the same against the objection of the accused. So, a counsel, against such objection, cannot be obliged to produce or disclose the contents of papers committed to him in his official capacity by the accused.[2]

It is to be remarked that the privilege of objecting to the disclosure in evidence by counsel of communications made to him professionally is *personal to the client* and for his benefit, and that the objection may be *waived* by him.[3]

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[1] In the absence of such protection, "the course of justice must stop. No man will dare to consult a professional adviser with a view to his defence or to the enforcement of his rights." * * * Without such privilege, "no person can safely come into a court either to obtain redress or to defend himself." Lord Ch. Brougham, in Bolton *v.* Corp. of Liverpool, 1 My. & K., 94, 95. And see Bk. of Utica *v.* Mersereau, 3 Barb. Ch., 528; Cheirac *v.* Reinicker, 11 Wheaton, 280; Aiken *v.* Kilburne, 27 Maine, 252; 4 Opins. At. Gen., 383; 1 Greenl. Ev. § 237–246. "But this protection does not extend to any such communications if made in furtherance of any *criminal* purpose." Manual, 85 § 99.

[2] But he may be examined as to the fact of the existence of such papers, in order to let in secondary evidence as to their contents. So he may be called upon to prove the identity of his client, or his handwriting. 1 Greenl. Ev. § 245; 4 Opins. At. Gen., 384.

[3] It is an implied waiver of the privilege for the party to examine his own attorney, as a witness, in regard to communications professionally made to him by the party, and where he does so, the witness is bound

The rule under consideration is laid down by the authorities with reference of course to *civilian* legal advisers. But, in principle, it is equally applicable to the relations between the accused and *military* persons acting as their counsel on military trials, where professional counsel is often not attainable and resort is frequently had to the assistance of officers or soldiers in the conduct of the defence.

It may be added that the privilege accorded to communications addressed to professional advisers extends only to those made by or on behalf of the client, and therefore not to such as may be made by a person other than the client or his agent.[1] Further, it has not been attached by the common law to communications made either to *clergymen* or *physicians*.[2] Such, indeed, especially those made to spiritual advisers, are, in many of the States, protected from disclosure in evidence by express statutes. But there is no statute of the United States on the subject, and those of the States cannot of course affect the practice of courts-martial in this particular.

III. ORAL TESTIMONY.

Evidence, upon judicial investigations, is communicated either orally or in writing. Oral testimony is that of Witnesses testifying *vica voce* in court, or by Deposition out of court.

The subject of Oral Testimony will be considered under the titles of: I. The Attendance of Witnesses; II. The Competency of Witnesses; III. The Examination of Witnesses; IV. Testimony by Deposition; V. The Credibility and Weight of Oral Testimony.

I. The Attendance of Witnesses.

As has been seen in Chapter V, a Court-Martial is not authorized, either by inherent judicial power or by express statute, to issue *writs*, and cannot therefore issue a writ, either of subpœna or attachment, to compel the attendance of witnesses. The

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to answer generally, on cross-examination. Crittenden *v.* Strother, 2 Cranch C., 464.

That the counsel may be willing to be examined does not affect the privilege of the client to object. Aiken *v.* Kilburne, 27 Maine, 252.

[1] Randolph *v.* Quidnick Co., 23 Fed., 278.

[2] 1 Greenl. Ev. § 247, 248; Manual, 85 § 100.

authority for this purpose has been vested by law in the Judge Advocate, as follows: (1) The Army Regulations, par. 1008, provide that—"The judge advocate shall summon the necessary witnesses for the trial." (2) Sec. 1202 of the Revised Statutes enacts—"*Every judge advocate of a court-martial shall have power to issue the like process to compel witnesses to appear and testify, which courts of criminal jurisdiction within the State, Territory, or District where such military courts shall be ordered to sit, may lawfully issue.*" The whole matter, therefore, of the summoning of witnesses before courts-martial, including the service and return of the summons, as also of the issuing, service and return of process of attachment, belongs properly to the subject of the authority and province of the Judge Advocate, and has accordingly been considered in Chapter XIII, relating to the duties and powers of that official.

II. THE COMPETENCY OF WITNESSES.

A rare issue at military law. The question of the competency of a witness, or his legal capacity to be sworn and to testify, is one rarely raised in the military practice. There is no statute law which in terms makes parties incompetent for any cause to testify as witnesses before courts-martial. The only public statute by which a person is made incompetent as a witness before courts of the United States—Sec. 5392, Rev. Sts., rendering thus incompetent a party convicted of perjury under its provisions—has no application to military tribunals. In many of the States, facts which, under the old common law, were grounds of incompetency, are now allowed to go only to the question of *credibility.*[1] In case, however, of an objection to a witness as incompetent being preferred to a court-martial, the common-law rules are, in the absence of statute on the subject, to be recurred to, to see if they are applicable to the case. The principal of these rules will therefore be noticed here.

Insensibility to the Obligation of an Oath. This is one of the common-law grounds of incompetency,[2] but in recent times a much more liberal view has been taken than formerly as to the quality of the insensibility, or want of religious belief, which should be deemed to render a witness incompetent to be sworn in the usual manner. To render a witness competent, "it is enough," says Greenleaf,[1] "if he has the religious sense of accountability to the Omniscient Being who is invoked by an oath." The form of oath for witnesses prescribed by Art. 92 of our military code, concludes with the usual appeal to the Deity; and a witness who takes this oath, though he may have no positive faith, should at least have some such sense of accountability to qualify him for taking it. But that a person is not competent to take a judicial oath is never to be *presumed*,[2] and, in view of the multiplicity of religious creeds and the freedom of religious belief recognized in this country and impliedly sanctioned by the Constitution, the objection to a mature person offered as a witness, that he was insensible to the obligation of an oath, would have to be most clearly established to be accepted as excluding him from the stand on a military trial.[3] If indeed he "objects to take an oath, or is objected to as incompetent to take an oath,"[4] he may always be *affirmed*, and the objection be thus wholly avoided. In the case of a very young child, the question as to its sense of religious obligation is a more serious one, though here the proper objection would be that of deficiency of intelligence rather than of religious sensibility. Where indeed a young child, who is to be a material witness, is quite ignorant of the obligations of an oath, it should be instructed beforehand, by some competent person—as a clergyman, as to the nature of the oath and the moral consequences of false swearing. A momentary instruction at the time of the trial is not sufficient.[1] The court, in a case of doubt, will, by questioning the child, satisfy itself whether he or she has the requisite appreciation of the significance of an oath to make proper its administration. Where there is an apparent lack of knowledge, and no opportunity for instruction has been had, the court may grant a continuance to enable such instruction to be given. These considerations are especially important on a trial for the rape of a young female child.

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[1] That "mere *interest*" no longer affects the competency of a witness, see Reagan *v.* U. S., 157 U. S., 306.

[2] See 1 Starkie, Ev., 22; 1 Greenl. Ev. § 306.

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[1] 1 Ev. § 372.

[2] "The law, on grounds of policy, presumes that all witnesses tendered in a court of justice are not only competent but credible." Wharton, Cr. Ev. § 358.

[3] The weight of authority seems to be in favor of the view that the objection must be sustained by the testimony of persons other than the witness—persons who have heard his declarations, &c.; and that the witness himself cannot be personally questioned as to his religious opinions. 1 Greenl. Ev. § 370 and note; Wharton, Cr. Ev. § 358, 362.

On Gen. Swaim's Trial, a witness, objected to as incompetent for want of religious belief, stated that he neither believed nor disbelieved in the existence of a Supreme Being—was an "Agnostic." No other testimony was offered. The Court sustained the objection.

In a case in G. O. 10, Dept. of the Columbia, 1871, in which an Indian witness was rejected as incompetent because insensible to the sanctity of an oath, the proceeding was disapproved for the reason that no *proof* of such insensibility appeared to have been offered.

[4] Manual, 93-4.

It is to be noted that the exception under consideration, where it exists in any degree to a witness, may in general be avoided by his making *an affirmation in lieu of an oath*[2]—as all witnesses are authorized to do by our law.[3]

Infamy. At the common law, "infamy," or the status of having been convicted of an "infamous" crime, renders a person incompetent as a witness. The term infamous crime comprehended "treason, felony, and the *crimen falsi;*" the latter term having reference to such offences as perjury, forgery and conspiracy and to certain frauds. An objection on the ground of infamy can be sustained only by the production of the record of conviction and judgment; proof merely that the party has been subjected to the *punishment* is not sufficient.[4] It is apparently held by the weight of authority that a record of a "*foreign*" judgment—as a judgment of a court of a different State—will not sustain this objection.[5] Whether, therefore, a conviction of a felony by any civil court—or any such court other than a court of the United States—could be accepted as establishing such objection before a court-martial is certainly doubtful. At military law, in the absence of any statute attaching such a disability, the fact that an officer or soldier has been convicted of desertion or other military offence can affect in no manner his competency as a witness before a court-martial.[1] A military case to which the common-law rule would appear most aptly to apply would be one of an officer or soldier convicted by a court-martial, in time of war, of one of the higher crimes specified in Art. 58.

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[1] G. C. M. O. 10 of 1886.

[2] Wharton, Cr. Ev. § 361.

[3] "A requirement of an 'oath' shall be deemed complied with by making affirmation in judicial form." Rev. Sts., Sec. 1. And see Article 92.

"Persons who entertain conscientious scruples against the form of a judicial oath are allowed, when summoned as witnesses, to use the form—'I solemnly and truly declare and affirm,' or words to like effect, but without importing any relaxation of the punishment of perjury if they give false testimony." Abbott's Law Dictionary—Affirm.

In an affirmation, the invocation—"*So help me God!*" is of course omitted.

[4] 1 Greenl. Ev. § 372, 375.

[5] 1 Greenl. Ev. § 376; Wharton, Cr. Ev. § 363, note.

Deficiency of Understanding. The persons held incompetent for this cause are chiefly idiots, insane persons, persons in a state of intoxication and very young children. In the words of the Manual[2]—"A witness is incompetent if, in the opinion of the court, he is prevented by extreme youth, disease affecting his mind, or any other cause of the same kind, from recollecting the matter on which he is to testify, from understanding the questions put to him, from giving rational answers to those questions, or from knowing that he ought to speak the truth." That a person is *deaf and dumb* does not render him incompetent, provided he has average intelligence and can communicate what he knows either in writing or by signs through an interpreter.

Unless there is something in the appearance of the witness when he comes to the stand clearly indicating that he has not at the time the requisite intelligence, the *onus* of showing that he is incompetent from want of understanding will be upon the party objecting. The court also, especially in the case of children, may itself properly interrogate the witness, with a view to more fully satisfying itself as to his competency.[3]

The law has fixed no age at which a *child* may be presumed to have the requisite understanding to qualify it to be a witness: the competency of children depends more upon intelligence than age.

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[1] G. O. 48, Dept. of the Platte, 1867; Do. 2, Dept. of Dakota, 1875; G. C. M. O. 103, Dept. of the East, 1870; Do. 44, Dept. of the Columbia, 1881; Do. 45, Dept. of Cal., 1883.

A person is not rendered incompetent to testify as a witness before a military court by the fact that he is an enemy in arms. See DIGEST, 397. Officers of the Confederate army were admitted to testify upon the trials, by military commission, of the Assassins of President Lincoln, and of Capt. Henry Wirz, in 1865, while the *status belli* was still pending.

[2] Page 83 § 86.

[3] See 1 Greenl. Ev. § 367.

As to *insane* persons, the fact that they are subject to fits of derangement does not affect their competency, provided they are sane at the time of being called upon to testify.[1] So a person insane upon some particular subject or subjects will not be incompetent as a witness if his delusions do not materially impair his general intelligence.[2]

Intoxication should in general render a person only temporarily incompetent as a witness. "Witnesses put aside when drunk may be examined when sober."[3]

Wives of Accused Persons. The familiar general rule of the law of evidence, founded on public policy, that neither the husband nor the wife is competent as a witness either for or against the other, though departed from in some of the States, is strictly held in the criminal courts of the United States and in courts-martial.[4] The rule excludes all communications, whether oral or in writing.[5] And the application of the principle extends "to all cases in which the interests of the other party are involved."[6] Thus the testimony of the wife of an accused will not be admissible for or against a party jointly charged with him where her testimony will be material to the merits of the question of the guilt or innocence of her husband.[7]

The general rule, however, is subject to exception in cases "where the trial is for bodily injury or violence inflicted by the husband on the wife or *vice versa*."[8]

Thus, in a military case, a wife would in general properly be held competent to testify against her husband when charged with a violation of the 61st or 62d Article of war in maltreating her under circumstances rendering his act a military offence.[1]

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[1] Evans *v.* Hettich, 7 Wheaton, 470; 1 Greenl. Ev. § 365; Simmons § 921.

[2] Regina *v.* Hill, 5 Eng. L. & E., 547.

[3] Simmons § 921.

[4] G. O. 6, Div. Pacific, 1887; G. C. M. O. 84, Dept. of the Platte, 1890. See the reasons for this rule as set forth by McLean, J., in Stein *v.* Bowman, 13 Peters, 223; also in 1 Greenl. Ev. § 254, 334, 337. And see the more recent case of U. S. *v.* Jones, 32 Fed., 569. The statute of 1878 authorizing accused persons to testify, (see *post*,) does not affect the application of the rule. See DIGEST, 750.

[5] State *v.* Mathers, 64 Vt., 101.

[6] 1 Greenl. Ev. § 335.

[7] 1 Greenl. Ev. § 335, 407; Simmons § 925; Territory *v.* Paul, 2 Mont., 314.

[8] Manual, 82 § 85.

Accused Persons Themselves. By the Act of Congress of March 16, 1878, c. 37, it is provided that upon criminal trials and proceedings before not only "United States courts" and "Territorial courts," but also "courts-martial and courts of inquiry," the accused "*shall, at his own request, but not otherwise,*[2] *be a competent witness. And*"—it is added—"*his failure to make such request shall not create any presumption against him.*" An accused person thus may, at his option, take the stand as a witness, but in so doing he occupies no exceptional status,[3] and becomes subject to cross-examination like any other witness.[4] As a witness, he cannot be permitted to state only circumstances favorable to himself and maintain silence as to the other facts in the case;[5] nor, as it has been repeatedly held,[6] can he read or put in an *ex parte* "statement," sworn to, as his testimony. The same rules as to the admissibility of evidence, privilege of the witness, impeaching of his credit, &c., will apply to him as to any other witness, and the only noticeable difference between his attitude and that of other witnesses will be that he will in general naturally and properly enough be exposed to a more searching cross-examination.[1]

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[1] See cases in G. C. M. O. 17 of 1871; G. O. 1, Dept. of Miss., 1866.

[2] These words—"at his own request but not otherwise," indicate the distinction between our law and that of Europe, where, at courts-martial, the inquisitorial form of examination is pursued as to the accused. In G. C. M. O. 11, Navy Dept., 1895, the Secretary of the Navy, in citing this Work, observes—"the accused should not be obliged to testify in his own behalf, and should not be made a witness except at his own request."

[3] McKeone *v.* People, 6 Col., 346; G. C. M. O. 179, Dept. of Dakota, 1882.

[4] Wheelden *v.* Wilson, 44 Maine, 11; Marx *v.* People, 63 Barb., 618; Fralich *v.* People, 65 Id., 48; Clark *v.* State, 50 Ind., 514; People *v.* McGungill, 41 Cal., 429; Rea *v.* Missouri, 17 Wallace, 542; G. O. 8, 16, Dept. of the Platte, 1879; Do. 6, Id., 1880; G. C. M. O. 34, Dept. of Texas, 1879; Do. 13, Id., 1882; Do. 179, Dept. of Dakota, 1882.

[5] G. C. M. O. 18, 32, Dept. of the East, 1886.

[6] G. C. M. O. 30, Dept. of the East, 1886; Do. 9, Dept. of the Mo., 1886; Do. 49, Dept. of California, 1886; Do. 3, Dept. of Dakota, 1886; Do. 76, Id., 1892; Do. 5, Id., 1893; Do. 3, Dept. of Texas, 1886; Do. 5, Id., 1890; Do. 39, Id., 1893; Do. 6, Dept. of Arizona, 1887; Do. 21, 25, Id., 1888; Do. 4, Dept. of the Columbia, 1888.

Inasmuch as the Act of 1878 provides that the "failure" of an accused to make the request to be a witness "shall not create any presumption against him," it has been held by the U. S. Supreme Court that it was not allowable to make "comment, especially hostile comment, upon such failure" to the jury. "The minds of the jurors," it was said, "can only remain unaffected from this circumstance by excluding all reference to it."[2]

Co-accused and Accomplices. Except when testifying at his own instance under the Act of 1878, above cited, a defendant in a criminal case is not regularly competent as a witness for or against a *co-defendant* unless he has been discharged from the record,—as by the entry of a *nolle prosequi*,—or unless, having been accorded a separate trial, (a proceeding of rare occcurrence in the military practice,) he has been duly acquitted or convicted. In military cases where the prosecution proposes to call upon a co-accused as a witness, the entry of a *nolle prosequi*, though the more usual course, is not invariable: where this course is not pursued, and the witness has testified in good faith on the trial, it is in general announced in the Order in which the proceedings in the case are passed upon that he is released from arrest, and further proceedings against him are discontinued.[3]

But the mere fact that a person was an *accomplice* of the accused does not so identify him with the latter as to render him incompetent to testify for or against him. Nor is his competency affected by the fact that he has himself been charged—separately—with the same offence. The objection is not to his competency but to his *credibility*—as will be noticed under another head.[4]

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[1] See Rea *v.* Missouri, 17 Wallace, 542. But the cross-examination should not be extended beyond the limit observed for other witnesses. Thus where the accused took the stand to testify, and did testify, only as to the *date* of his confinement in arrest, it was held that it would be inquisitorial and illegitimate to cross-examine him as to other facts of the merits of the case. G. C. M. O. 29, Dept. of Dakota, 1893.

[2] Wilson *v.* U. S., 149 U. S., 60, 65. And see U. S. *v.* Pendergast, 32 Fed., 198.

[3] See instances in G. O. 13, Dept. of the South, 1866; Do. 30, Dept. of Cal., 1865.

[4] See "The Credibility and Weight of Oral Testimony," *post.*

Other Persons. Neither a member of a court-martial, the judge advocate, nor the officer who is to review and pass upon the proceedings, is incompetent to testify before the court.[1] It is not desirable, however, that any of these officials should appear as witnesses, except perhaps to give evidence as to the military character or record of the accused. As has been remarked in a previous Chapter,[2] a resort to a *member* as a witness on the merits is especially to be avoided.[3]

III. THE EXAMINATION OF WITNESSES.

This subject will be considered under the heads of:—1. Direct Examination; 2. Cross-Examination, 3. Re-examination, &c.; 4. Rebuttal; 5. The privilege of the witness as to not answering criminating, &c., questions; 6. Impeaching testimony; 7. Testimony as to good character.

1. Direct Examination.

This, which is also called the "Examination-in-chief," is the original examination, by the party producing them, of the witnesses by whose testimony he seeks to maintain his side of the case. It refers mainly to that examination by which, (subject to cross-examination by the adverse party,) the prosecution or defence is opened and displayed. It embraces also, however, the examination of witnesses offered *in rebuttal* of direct testimony from the other side,—as where witnesses are introduced to meet new matter brought out in the defence, or to show that impeaching testimony is itself unworthy of credit.

Premising that the direct examination of every witness properly begins in general with asking his name, and, in military cases, his office, rank, corps, regiment, &c., and whether he knows or identifies the accused,—we proceed to notice certain general principles which, though *in part* applicable to all stages of the examination of a witness, are best illustrated as governing the Examination-in-chief—as follows:

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[1] DIGEST, 750–1.

[2] Chapter XII.

[3] It may be noted here that persons of alien races, including *Indians*, are competent as witnesses, equally with white persons, natives, or citizens, in the courts of the United States. See G. C. M. O. 54, Div. of the Pacific & Dept. of Cal., 1879; Sec. 1977 Rev. Sts.

The Examination should consist of Questions relevant to the Issue. This rule, the application of which is one of the features which distinguish the direct from the cross examination, has been specifically considered under an earlier title.[1]

All the Testimony is to be viva voce, and to consist of Facts derived from the Personal Knowledge and Memory of the Witness. This principle is indeed one of general application, but is here noticed because of two apparent qualifications which affect its operation in the course especially of the direct examination.

Memorandum to refresh memory. Thus, the general rule is compatible with allowing a witness to "refresh and assist" his memory by a reference to some *writing*, which may be either an official document or other written instrument, (original or copy,) a formal entry in a book, or any mere note or memorandum, written or in print. Where the writing consists of a memorandum or paper made by the witness himself, it should appear, from his testimony, to have been made at the time of the fact or transaction to which it refers, or so soon after as to afford the presumption that the memory of the witness as to such fact, &c., was fresh in making it. Where the paper is not one made by the witness, it must appear that, on inspecting it, he can speak to the facts from his own recollection; otherwise he cannot be permitted to make use of it. Nor indeed can he use it in any case, or by whomever made, unless it enables or assists him to testify as of his own memory or knowledge. If, instead of serving as a refresher of memory, it is relied upon to supply facts not otherwise known to the witness, it is of course not a legitimate means of reference.[2] It is usual and desirable, (though not essential,) that the writing be brought into court and produced by (or exhibited to) the witness upon the stand, since thus its nature and effect can be fully made to appear on the direct or cross examination.[1]

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[1] See "Admissibility of Evidence," *ante.*

[2] U. S. *v.* Wood, 3 Washington, 440; Patriotic Bk. *v.* Frye, 2 Cranch C., 684; State *v.* Rawls, 2 Nott & McC., 331; Elston *v.* Kennicott, 46 Ills., 187; Hill *v.* State, 17 Wisc., 675; 1 Greenl. Ev. § 436–438; Manual, 86. It is not sufficient for the witness to swear that he made a memorandum which he believes to be true, and that he relies upon it without any present recollection of the facts. Lawrence *v.* Baker, 5 Wend., 305. The privilege of using a paper as a memorandum to refresh the memory, does not authorize the witness to read his evidence from notes previously prepared. Maltby, 44–5. It has been held that a witness may make use, as a refresher, of a *copy* of an original memorandum, provided it satisfactorily appears that the copy

Statement of opinion or belief. The general rule, in requiring the witness to state facts within his personal knowledge, does not require that he should speak with entire certainty, but only to the best of his recollection. If his testimony, though not of an assured character, be based upon *some* memory of the facts, it will be admissible for what it is worth. But the rule, (*except* as presently to be noted,) *does* exclude all matters resting in the individual *opinion* of the witness. His opinion upon the merits of the issue, or as to the motives, intention, or conduct of the accused or others, or the effect of their acts, or as to what would have been his own conduct in a particular case, or upon any general question of moral or legal obligation, is wholly inadmissible and should be ruled out on objection made.[2]

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is a true one. Chicago, &c., R. R. Co. *v.* Adler, 56 Ills., 344. In a case in G. C. M. O. 22, Dept. of the East, 1882, it was held that a guard book, containing an entry of a charge of absence-without-leave against a soldier, not being evidence of the commission of the offence, could be used as a memorandum to refresh the memory of a witness as to the occurrence.

[1] 1 Greenl. Ev. § 437, and notes.

[2] See 1 Greenl. Ev. § 441; Manual, 86; O'Dowd, 7; Witnesses are not to testify as to their *opinion* or what they *think*, but what they *know* or have *seen*. G. C. M. O. 64, Dept. of the East, 1872. Opinions of witnesses, who are not experts, are not admissible. G. O. 4 of 1843; Do. 32, Dept. of the East, 1869; G. C. M. O. 121, Id., 1871; G. O. 42, Dept. of the Platte, 1871; G. C. M. O. 17, Dept. of Texas, 1873. Opinions of officers on points upon which the *court* is the proper judge are inadmissible. G. C. M. O. 41, Dept. of the East, 1872; Com. Wilkes' Trial, pp. 39, 85, 94. A witness cannot be asked his opinion of the prisoner's guilt. G. C. M. O. 21, Dept. of the East, 1871. Nor whether he thinks that the accused intended to desert, this being a question for the court. G. C. M. O. 75, Dept. of the East, 1871; Do. 5, Id., 1891; Do. 11, Id., 1893.

In G. C. M. O. 42, (H. A.,) 1890, it was held that the court improperly admitted, against the objection of the judge advocate, certain indorsements of commanders expressing the opinion that the accused was not guilty of negligence justifying his trial. In G. C. M. O. 1, Dept. of Arizona, 1892, the reading, by counsel for the accused, by permission of the court, of "indorsements upon the charges referred to the court for trial, for the purpose of showing the opinion of the commanding officer of the post as to the gravity of the offence"—was held to be "irregular," but was really wholly incompetent.

For a witness, however, to declare the existence or occurrence of a fact which is a matter of *common observation*, and in general palpable and scarcely mistakable—as the fact of *drunkenness*, or that the accused or other person *was drunk* on a certain occasion —is not properly a statement of an *opinion*, but of a fact so far within the personal knowledge of the witness as to render it admissible in evidence.[1]

Exceptions—Facts at issue resting on belief. There are to be noticed two excepted classes of cases, however, in which witnesses are allowed to declare their opinion or belief. The *first* is where a certain matter of fact resting wholly on belief is directly in issue, as the fact, for example, of the *identity* of a person. So of the fact that a writing is or not in the *handwriting* of a party: here a witness familiar with the handwriting may be asked and may state his belief as to the fact in issue, without being an expert.[2]

Opinions of experts. The second class is the familiar one of cases involving questions of science or questions requiring for their solution a peculiar skill or knowledge of a specialty, in which is admitted the testimony of *experts*.[1] Thus, military officers may give evidence as experts upon issues requiring, for their proper solution, technical military knowledge;[2] and in the military practice, as in the civil, medical men, whether or not officers of the army, are frequently and properly called to testify as to the cause of death or disease, the effect of wounds or injuries, or the question of the sanity of an accused person, witness, &c. Such experts, in expressing their opinions, need not found them upon any personal observation;[3] it is sufficient if they are based upon the facts of the case as narrated by other witnesses whose testimony they have listened to, or, where they have not heard the facts detailed in evidence, upon a statement of similar facts presented hypothetically by the examining party or counsel.[1] But the expert cannot state his opinion "as to the general merits of the cause," but only his opinion "upon the facts proved;" nor can he state it as to any *other* question in the case not involving expert knowledge for its solution.[2]

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[1] People *v.* Eastwood, 14 N. Y., 562; Stacy *v.* Portland Pub. Co., 68 Maine, 279; Sydleman *v.* Beckwith, 43 Conn., 12; State *v.* Huxford, 47 Iowa, 16; DIGEST, 395; G. O. 42, Dept. of the Platte, 1871; G. C. M. O. 2, Dept. of Texas, 1890. Witnesses, however, who testify that the accused was drunk should in general be "required to state in detail the specific facts upon which their judgment of his condition was based." G. C. M. O, 59, Div. Atlantic, 1888. As to drunkenness, the views of officers and non-commissioned officers are in general more reliable than those of private soldiers. G. O. 27, Dept. of the Arkansas, 1866. But the witness could not properly be asked whether the accused was so drunk as to be incapable of forming a criminal intent. Armor *v.* State, 63 Ala., 173.

"Opinions of witnesses derived from observation are admissible when, from the nature of the subject under investigation, no better evidence can be obtained." Brown *v.* Com., 14 Bush., 405. And see Hardy *v.* Morrill, 56 N. H., 232. In Ins. Co. *v.* Lathrop, 111 U. S., 612, it is held that a non-expert may give his opinion as to the *sanity* of another person, in connection with a statement of the facts and circumstances within his knowledge upon which such opinion is based.

[2] As to proof of Handwriting by experts, &c., see "Private Writings," *post.* In Smith *v.* U. S., 24 Ct. Cl., 209, it was held that the Secretary of War was empowered to employ (and authorize a paymaster to pay) special experts to elucidate a question of handwriting at issue before a court-martial.

As to the payment of extra fees to expert witnesses, see Circ. No. 13, (H. A.,) 1891.

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[1] See 1 Greenl. Ev. § 440. The qualifications of the expert to give evidence, as such, may be tested not only by interrogating the witness himself as to his experience, but also, (though this means is not often resorted to,) by the testimony of other witnesses. Tullis *v.* Kidd, 12 Ala., 648. And not only should the character of experts, as such, be "satisfactorily established," but their testimony, to be reliable, "must be free from suspicion of interest, bias, or prejudice." Schultz *v.* U. S., 2 Ct. of Cl., 380. In Johnson *v.* Root, 1 Fisher, 361, Sprague J. charges the jury to consider, in weighing the testimony of an expert, "his ability, his knowledge of the art or profession in which he is engaged, the fairness with which he expresses an opinion, the impartiality of that opinion, and all those considerations which go to create a confidence or a distrust of the opinion which is given. You will," he adds, "take into consideration also the reasons that may be assigned by the experts for their opinions." In Tullis *v.* Kidd, it was held, in regard to a medical expert, that it was not necessary that he should be in the practice of his profession, if it appeared that he had studied it as a science, and "felt confident to express a medical opinion upon a particular disease;" the fact that he was not at the time a practicing physician going to his credibility only. But of course the weight and value of the testimony will depend mainly upon the amount of the practical experience of the witness. See Allen *v.* Hunter, 6 McLean, 303.

[2] They cannot, however, be resorted to as *experts in general* upon military trials—as, for example, as experts upon questions of military law. See G. C. M. O. 41, Dept. of the East, 1872. In Do. 113, Id., 1871, the action of a court-martial in calling upon the Judge Advocate of the Department to testify as an expert upon a question of law raised in the case—whether a member absent at the organization could subsequently come in, qualify and act—was properly disapproved by the Dept. Commander.

[3] See 3 Greenl. Ev. § 5.

A Party may not impeach the Credibility of his own Witness. This is also a general rule peculiar to the direct examination. A party, in offering a witness, is presumed to be acquainted with his character and is viewed as representing him as entitled to credit. He is therefore in general bound by the statements of the witness, and if such statements prove contrary to what he expected, he will not be permitted to impugn the credibility of the witness, either directly by attacking his general reputation for veracity, or indirectly by "general evidence tending to show him unworthy of belief."[3] The party is not indeed precluded from putting in *other* testimony, as to a particular fact, which is directly contradictory to the testimony of such witness;[1] but such other testimony cannot properly be introduced in the form of a personal reflection upon the witness. Where, however, a party has been *innocently misled* by the witness whose statement on the stand turns out to be materially different from the one previously made, and which induced the party to introduce him, "the weight of authority," says Greenleaf, "seems in favor of admitting the party to show, that the evidence has taken him by *surprise*, and is contrary to the examination of the witness preparatory to the trial, or to what the party had reason to believe he would testify; or, that the witness has recently been brought under the influence of the other party, and has deceived the party calling him.[2]

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[1] The following appear to be approved forms of interrogating the expert in this class of cases: 1. *Where the expert has heard all the testimony in regard to the actions, indications, &c., of the accused, (or witness,) alleged to have been insane.* Here he may properly be asked—"Supposing the testimony which you have heard to be true, is it your opinion thereon that such person is, (or was, at the time of the offence,) insane?" It may be also asked—"What state of mind do such symptoms, &c., indicate?"—or "What would, in the belief of the witness, be the conduct of such a person in certain supposed circumstances." (See Com. *v.* Rogers, 7 Met., 506.) 2. *Where the expert has not heard the testimony or has heard it only in part.* Here it is the practice for the examining party or counsel to state to the witness the substance of the testimony, and then to ask, whether, *supposing such testimony to be true*, the person in question was, (or is,) not, in the opinion of the witness, insane, &c., as above. The hypothetical question must be based upon previous evidence in the case tending to prove the matters stated in the question. Bomgardner *v.* Andrews, 55 Iowa, 638.

[2] See 1 Greenl. Ev. § 440; U. S. *v.* McGlue, 1 Curtis, 1. "Even where the medical or other professional witnesses have attended the whole trial and heard the testimony of the other witnesses as to the facts and circumstances of the case, they are not to judge of the credit of such witnesses or of the truth of the facts testified by them." Com. *v.* Rogers, 7 Met., 505.

[3] Greenl. Ev. § 442; Lawrence *v.* Baker, 5 Wend., 305; Cooker *v.* The Tolacca, 7 Philad., 199. In G. O. 4 of 1843, where the accused was allowed by the court to call a witness to contradict a previous witness introduced by him, and show that the latter had made a different statement from that given in his testimony, the proceedings were in this respect disapproved by the Secretary of War. And see G. C. M. O. 71, Dept. of the Platte, 1890.

Leading Questions are Not to be Asked. It is a further general rule governing the *direct* as distinguished from the *cross* examination,[3] that a "leading" form of questioning a witness may not be pursued in regard to the material facts at issue in the case on trial.[4] The 90th Article of war recognizes this rule in making it the duty of the judge advocate to "object to any leading questions to any of the witnesses," as a measure of protection to the accused. Leading questions may be said to consist mainly of three sorts, closely connected however in their nature, as follows:—1. Those "which suggest to the witness the answer desired;" 2. Those "which, embodying a material fact, admit of an answer by a simple negative or affirmative;" 3. Those which, in their form, "assume facts to have been proved which have not been proved," or assume "that particular answers have been given which have not been given."[1] The proper and legitimate province of direct examination is to elicit the precise matters of fact within the knowledge or recollection of the witness and no more, and to induce him to communicate them naturally and in his own language, without either prompting or restraint. Any direction, therefore, given to his thoughts, on the part of the interrogator; any suggestion as to the form or substance of his answer; any repression of a full statement of what he has to say that is material; any deceit or disingenuousness concealed in the question that may tend to shape the reply of the witness, divert it from its intended form, or, in short, prevent or embarrass a true and honest response,—these and all similar influences and expedients are, as a general rule, irregular and unauthorized.[2]

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[1] 1 Greenl. Ev. § 443; U. S. *v.* Watkins, 3 Cranch C., 442; Lawrence *v.* Baker, 5 Wend., 305; Clapp *v.* Peck, 55 Iowa, 270.

[2] 1 Greenl. Ev. § 444. That a party may discredit his witness where he has been entrapped, see McDaniel *v.* State, 53 Ga., 253.

[3] "To allow leading questions is to give direct the character of a cross-examination." People *v.* Mather, 4 Wend., 247. As to the use of leading questions on the cross-examination, see *post.*

[4] "Such a question cannot be put on main examination even to contradict another witness." U. S. *v.* Angell, 11 Fed., 34. But the rule does not apply to questions put in regard to *preliminary* matter, not tending to prove or disprove the issue. Gannon *v.* Stevens, 13 Kans., 447; 1 Greenl. Ev. § 434. "It would be mere waste of time to enforce the rule where the questions asked are simply *introductory*, and form no part of the real substance of the inquiry, or where they relate to matters which though material, are not disputed. But where a question relates to a contested point, which is either directly conclusive of the matter in issue, or directly and proximately connected with it, the rule should nearly always be strictly enforced." Manual, 87 § 106.

Exceptions. There are recognized, however, certain excepted cases in which leading questions may not only be proper but necessary for the eliciting of the truth. 1st. As where the witness is manifestly *hostile* to the party by whom he has been called, or is in the *interest* of the opposite party, or exhibits, for some cause, a decided *unwillingness or reluctance* to testify, or a disposition to prevaricate, or is stupid, or is very young.[3] 2d. A further exception is where the testimony of the witness is defective in that he cannot recollect or specify a certain material fact: here it may be permitted to mention or suggest the particular matter in regard to which an answer is desired.[1] But in such a case the most approved course is first to exhaust the recollection of the witness in asking him what was said or done, &c., in general, at the time in question. If, when he has made his statement in answer, some material circumstance is omitted, the best practice is to ask him if he has stated all that he remembers, and, upon his replying that he has, to then call his attention, by specifying it, to the particular fact, thing, or language, and inquire if it existed, was done, said, &c. Among the more familiar occasions for pursuing this course are those where a name, a date, or an item such as an article of property—perhaps one out of many—has been forgotten; or where disrespectful or other material words spoken, the phraseology of a verbal order, &c., cannot be recalled or accurately testified to without being so specified.

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[1] 1 Greenl. Ev. § 434; Manual, 87 § 106. "It is a mistake to suppose that such only is a leading question to which *yes* or *no* would be a conclusive answer. A question is also leading which puts into a witness' mouth the words that are to be echoed back, or plainly suggests the answer which the party wishes to get from him." Marcy, J., in People *v.* Mather, 4 Wend., 247.

[2] "If it were not for this rule, a favorable and dishonest witness might be made to give any evidence that is desired." Manual, 87 § 106.

[3] 1 Greenl. Ev. § 435; People *v.* Mather, *ante;* Moody *v.* Rowell, 17 Pick., 498; Coon *v.* People, 99 Ills., 368; G. C. M. O. 18 of 1874—remarks of Gen. Terry; Do. 14 of 1864; G. O. 36, Dept. of La., 1869; Manual, 88–9.

Discretion of the court as to the admission of leading questions—Military cases. Whether, in any civil case, the circumstances presented constitute so far an *exception* to the general rule as properly to allow leading questions to be put on the direct examination of a witness, is a matter which rests entirely in the *discretion* of the court, and not one which can be "assigned for error."[2] So, in a *military* case, the improper admission of a leading question or questions would not affect the legal validity of the proceedings, though, in an extreme instance, it might well induce a disapproval of the same.[3]

A special form of leading interrogation, sometimes pursued in military cases but irregular and improper, may here be noticed. This consists in reading the charge and specification, or stating their substance to the witness, and then asking him what he knows on the subject. This form is objectionable in that it leads the witness as to the details of the offence as charged, and suggests them to him as a given basis for his testimony, instead of leaving the same to rest solely on his personal knowledge and recollection. It has been repeatedly condemned by the authorities and in Orders.[1]

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[1] 1 Greenl. Ev. § 435; Manual, 88; People *v.* Mather, *ante;* Moody *v.* Rowell, *ante.*

[2] 1 Greenl. Ev. § 435; Moody *v.* Rowell, *ante;* Donnell *v.* Jones, 13 Ala., 490; Shufflin *v.* People, 4 Hun., 16; King *v.* Mittalberger, 50 Mo., 182.

[3] In G. O. 36, Fifth Mil. Dist., 1868, it is remarked by the reviewing officer, (Gen. Neill,) in regard to the action of the court in admitting questions of this character, as follows:—"There appears to have been no limit to the number of leading questions improperly allowed. Thus arbitrarily to set aside the rules of evidence is unprecedented and illegal. A Court possesses no power to authorize the examination of a witness to be conducted in any other manner than that sanctioned by the well-established rules of law. The proceedings are disapproved." And see G. O. 71, Dept. of Dakota, 1870.

2. *Cross-Examination.*

Its Scope in general. The direct examination of a witness being concluded, the opposite party, though he may waive it, proceeds ordinarily to avail himself of the right of cross-examination. So essential is cross-examination, or the opportunity to cross-examine, to the acceptance of facts as legal testimony, that all *ex parte* statements whatever, whether or not sworn to, are radically incompetent as evidence on the merits, and should be absolutely excluded by the court, even though the party entitled to object may be willing to consent to their introduction. An *ex parte* statement or declaration, whether or not in the form of an affidavit, is essentially illegitimate material upon which to base, wholly or in part, a finding by a court or an approval by a reviewing officer.[2]

The exercise of the right of cross-examination, as a test of the perception, observation, recollection and veracity of the witness, —always important to the due investigation of truth and administration of justice,—has become even more so than formerly; certain classes of persons who once were excluded from the stand—including the accused himself[3]—being now admitted, and facts which once went to the competency now going to the credibility of the witness. In view of its purpose and significance, a much greater latitude is properly allowed in the cross-examination than in the direct;[1] leading questions, for example, being freely permitted;[2] and matters otherwise irrelevant and collateral being allowed to be gone into to a reasonable extent, (and subject to the limitations yet to be noticed,) where properly apposite to the testing of the knowledge, memory, or *animus* of the witness, or to discrediting him in general.[3]

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[1] See McNaghten, 185; Bombay R., 28; Gilchrist, 20; G. O. 12, Dept. of the Mo., 1862; Do. 36, Id., 1863; Do. 77, Dept. of fhe East, 1870; Do. 29, Dept. of Cal., 1865; G. C. M. O. 54, 120, Div. of the Pacific & Dept. of Cal., 1880; DIGEST, 394. A still more objectionable form is to recite the charge in terms or substance, and ask the witness directly whether the accused actually committed the specific act alleged. As—"Did he desert?" "Did he sell or through neglect lose his clothing, &c.?" See G. O. 67, Dept. of the South, 1874; DIGEST, 394-5.

[2] See G. C. M. O. 5, Dept. of Texas, 1890; Do. 5, 11, Dept. of Dakota, 1893; Do. 50, Navy Department, 1893.

[3] See "*Accused Persons Themselves*," and notes, *ante*.

Upon the liberty, however, of cross-examination there are certain restrictions, as follows:—

I. To be confined to the matter of the direct examination. The rule is established in the U. S. courts,[4] and commonly observed in the military practice,[5] of restricting in general the cross-examination to the subject and scope of the direct examination. Such rule tends to simplify and confine within reasonable limits the investigation of a criminal trial, and is peculiarly adapted to the purposes of a court-martial as an instrument of prompt and efficient justice. In consequence of this rule, if the adverse party wishes to examine the witness as to matters not embraced within the scope of the direct examination, he should, as observed by Judge Story, "do so by making the witness his own, and calling him as such, in the subsequent progress of the cause."[1] This rule indeed may be allowed to be departed from in the discretion of the court;[2] and it is to be understood that it has reference mainly to facts pertaining to the issue and material to the prosecution or defence, and does not apply to questions outside of the main subject at issue and asked for the purpose of testing the motives, prejudice, or credit of the witness.

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[1] It is however always within the discretion of the court to confine a cross-examination within reasonable limits—to stop it when unreasonably protracted. Reed *v.* Clark, 47 Cal., 194. Under the license of cross-examination a party cannot be permitted to bully or insult a witness, particularly when the latter is an official superior to whom he owes deference and respect. See remarks of Gen. Terry in G. C. M. O. 134, Dept. of Dakota, 1884.

[2] The right to employ leading questions on the cross-examination is subject to a possible limitation, in the discretion of the court, "where the witness shows a strong interest or bias in favor of the cross-examining party, and needs only an intimation to say whatever is most favorable to that party." Moody *v.* Rowell, 17 Pick., 498. And see G. C. M. O. 18 of 1874—remarks of Gen. Terry.

[3] "Everything which goes to affect the credit of a witness as to the particular facts to which he is called to testify is material and admissible." Com. *v.* Hunt, 4 Gray, 423. See the point, that questions as to the motives or *animus* of the witness are permissible on the cross-examination, recognized in G. C. M. O. 7 of 1873; Do. 8, Fourth Mil. Dist., 1867; Do. 23, Dept. of Texas, 1873; G. O. 11, Dept. of Cal., 1865; Do. 8, Div. of the Atlantic, 1875. That the question, whether the witness has not previously expressed *hostility* toward the accused, is not an irrelevant one on cross-examination, see *post.* In G. C. M. O. 24 of 1872, it was held that a witness, who had testified that the accused was drunk, might be asked, to test his powers of perception at the time, whether he was then himself sober. And see a similar case in G. O. 48, Dept. of the South, 1869, cited *post.* In G. C. M. O. Div. Atlantic, 1889, it was held admissible for the accused, on cross-examination, to interrogate a witness as to his sobriety at the time of the offence charged, the question directly affecting his credibility.

[4] R. R. Co. *v.* Stimpson, 14 Peters, 461; Houghton *v.* Jones, 1 Wallace, 702; Rea *v.* Missouri, 17 Id., 542.

[5] Simmons § 604; G. O. 85, Dept. of the Cumberland, 1867; G. C. M. O. 18, Dept. of the Columbia, 1880. But a party has the same right to cross-examine a witness as to matter brought out, on the direct examination, by questions addressed *by the court*, as he has in regard to matter brought out by the opposite party. G. C. M. O. 48, Div. of the Pacific & Dept. of Cal., 1880.

2. ***Not to be extended to collateral matters with a view to contradict the witness—Previous statements and expressions.*** It is an established rule of the law of evidence, repeatedly recognized in military cases,[3] that a party cannot be permitted to cross-examine a witness as to any "collateral, independent fact, irrelevant to the main issue," for the purpose of laying a foundation for subsequently contradicting him by other evidence and thus discrediting him; but that the answers of the witness to all such collateral interrogation are to be taken as conclusive against the cross-examining party.

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[1] R. R. Co. *v.* Stimpson, *ante.* Matters of defence are not in general properly proved by cross-examination. Dennis *v.* Van Voy, 2 Vroom, 38. A party who has not yet opened his own case cannot in general properly do so by a cross-examination of his adversary's witnesses. Thornton *v.* Hook, 36 Cal., 223.

[2] See Rea *v.* Missouri, 17 Wallace, 542.

[3] Simmons § 975; Lieut. Hyder's Trial, 157; Lieut. Col. Fremont's Trial, 256. And see the case of 1st Sgt. Clerc, in G. C. M. O. 45, Dept. of Cal., 1883, in which it is remarked by the reviewing authority, (Gen. Schofield,) as follows:—"The defence was permitted to ask a witness for the prosecution, on cross-examination, collateral and irrelevant questions, viz.: whather he had ever been tried or sentenced for desertion, with a view to contradicting him, (on his answering in the negative,) by subsequent testimony in chief, which also was allowed to be introduced against the objection of the judge advocate. In permitting this to be done, the Court disregarded one of the fundamental rules of the law of evidence, and its action is disapproved."

But a question whether the witness has not at some previous time told a *different story*, or given a *different account* of the matter testified to on his direct examination, is not collateral or irrelevant; nor is a question whether the witness has not previously expressed *hostility* toward the accused.[1] And questions of either kind, being relevant, may be asked the witness on cross-examination, with a view of contradicting him by other evidence, in the event of his returning a negative answer.[2] The form of the cross-examination in such cases will be further referred to under the head of "Impeaching Testimony."

3. *Re-Examination, &c.*

Its Scope. Where the witness, in the course of the cross-examination to which he has been subjected, has made statements not in harmony with those made upon the examination in chief, or statements of a doubtful or equivocal character, an occasion is presented for his *re-examination*, (or, as it is sometimes called, "examination in reply,") by the party who originally called him, for the purpose of eliciting from him an *explanation* of such statements, as also (if desired) of his *motives* in making the same. But this is, strictly, the full scope of a re-examination, which cannot in general extend to the bringing out of new matter,[3] and hence the desirableness of exhausting a witness as far as possible on the original examination.[4]

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[1] 1 Greenl. Ev. § 449, 450. That these questions may be asked notwithstanding the rank of the witness, see G. C. M. O. 66, (H. A.,) 1879; G. O. 11, Dept. of Cal., 1865; G. C. M. O. 31, Dept. of Dakota, 1869; Do. 8, Fourth Mil. Dist., 1867. In Do. 18, Div. Atlantic, 1886, the court was held to have been in error in refusing to the defence an opportunity of showing that a certain witness had expressed feelings of hostility against the accused, after such witness, on cross examination, had denied it.

[2] See the principle recognized in military cases, as to the expressing of hostility by the witness, in G. C. M. O. 8, Fourth Mil. Dist., 1867; G. O. 11, Dept. of Cal., 1865; Do. 8, Div. of the Atlantic, 1875;—as to the making of different statements by the witness, in G. C. M. O. 40, of 1880; Do. 8, Fourth Mil. Dist., 1867; Do. 23, Dept. of Texas, 1873; G. O. 31, Dept. of Dakota, 1869.

[3] See 1 Greenl. Ev. § 467. "On the re-examination no questions can be put which do not relate to matters inquired into on the cross-examination." Dutton *v.* Woodman, 9 Cush., 255.

[4] "On the examination in chief, the party calling a witness is bound at his peril to interrogate him as to all material matters in the first

Where, however, upon the cross-examination, the opposite party has been allowed to go into matters not testified to upon the direct examination, the other party will become entitled to re-examine as to the subjects of the testimony thus introduced.

4. *Rebuttal.*

New evidence introduced on the defence, or otherwise, may always be rebutted by the opposite party. Rebutting evidence is direct evidence, and the same rules apply to it as to the direct examination. It should be noted that mere *cumulative* evidence, or evidence repeating facts already introduced at a previous stage, is not, in general, properly admitted by way of rebuttal.

Exceptions to course of examination. As to the authority of the court, in its discretion, to allow a party to recall a witness, once dismissed, for further examination as to a material point inadvertently omitted to be inquired into, or a point since brought to the attention of the party, or for further cross-examination where the regular cross-examination has been closed; or to allow a witness to be further examined, or new witnesses to be introduced by a party, after he has rested his side of the case, or both sides of the case have been closed,—remark has been made in Chapter XVII, in considering the course of proceeding on the trial.[1]

Examination by the court. In the same Chapter is also noticed the subject of the extent of the authority of the *court* to examine the witnesses, and of the practice as to the form and occasion of such examination.[2]

5. *The Privilege of the Witness as to not Answering Criminating, &c., Questions.*

With the subject of cross-examination is connected that of the privilege of the witness to decline to answer certain classes of

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instance; and if any material question is omitted it cannot be put upon the examination in reply." Sartorious *v.* State, 24 Miss., 609. But while this is the strict rule, the court may, in its discretion, make exceptions in the interests of justice.

[1] See *ante*, pp. 428–429.

[2] Pages 429–430.

questions which more usually come to be asked at that stage of the examination.

Questions the Answer to which may Criminate. It is an established principle of the common law, recognized indeed and affirmed in the U. S. Constitution,[1] that a witness—whether the accused on the stand, or other witness—may refuse and cannot be required to answer a question the answer to which may tend to criminate him; or, as it is expressed by Greenleaf,[2] "have a tendency to expose him to a penal liability, or to any kind of punishment, or to a criminal charge;" or even, in the language of Chief Justice Marshall,[3] form a link in the "chain of testimony which is necessary to convict an individual of a crime." The privilege is held to be one personal to the witness, which he may avail himself of or not as he sees fit,[4] and it is further held that it is the duty of the court, if the witness declines or hesitates to answer, to determine whether the question has the supposed drift and instruct him as to the exercise of the privilege.[1] Where indeed he positively refuses to answer, such refusal is conclusive and the question cannot be put. In Burr's Trial[2] it is observed by the court—"If in such case he say upon his oath that his answer would criminate himself, the court can demand no other testimony of the fact." Where, however, in a military case, the answer will clearly not be criminating, the court will properly so advise the witness, and he will then properly answer, though he cannot be *required* to do so.[3]

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[1] "No person shall be compelled in any criminal case to be a witness against himself." Art. V of the Amendments.

[2] 1 Evidence § 451. And see Manual, 84; also Counselman *v.* Hitchcock, 142 U. S., 597, where it is held that Sec. 860, R. S., (applicable indeed only to civil, not to military, courts of the United States,) does not abridge this privilege.

[3] 1 Burr's Trial, 244.

[4] In a case in G. O. 48, Dept. of the South, 1869, where the question —"Were you under the influence of liquor at this time?" addressed to a witness, was objected to by a member on the ground that the answer might criminate, and ruled out by the court, the Reviewing Officer, (Gen. Terry,) in disapproving this action, remarks:—"The question was one of undoubted propriety and competency, as tending to show the weight or degree of credibility to be attached to the testimony of the witness. It in no wise tended to implicate him in the commission of any offence, military or civil, nor could the answer in any manner, direct or indirect, tend to degrade his character. Moreover, questions of the character indicated, are not subject to objection by a member of the court, the judge advocate, or by the accused. The right to answer or not as he pleases, *is the privilege of the witness*, and concerns neither the court nor any of its members. This privilege may be waived or asserted in the witness' discretion; and the duty of the court is fulfilled when it informs him of his right and leaves him free to exercise his discretion in the premises." In a later case it was ruled—"The privilege belongs exclusively to the witness, who may take advantage of it or not at his pleasure;" * * * he "may waive it and testify in spite of any objection coming from" a party to the proceeding. * * * "If ordered to testify in a case where he is privileged, it is a matter exclusively between the court and the witness. The latter may stand out and be committed for contempt, or he may submit; but a *party* has no right to interfere or complain of the error." So *held* that the fact that a court-martial erroneously required a witness, who claimed the

In the exercise of this privilege the law protects the witness from unfavorable presumptions; for if it be exercised, no legal inference as to the truth of the matter which was the subject of the inquiry is permitted to be drawn.[4]

The privilege cannot, of course, be claimed where the criminal liability has ceased;—as where the witness has been finally tried for the offence referred to in the question;[5] or prosecution for the same has been barred by the statute of limitations.[6] Nor can it be claimed on the cross examination where the witness has voluntarily testified without objection as to the subject of the question on the examination-in-chief.[7]

In military cases the principle has, properly, been recognized

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privilege, to answer, did not prejudice the legal rights of the accused, or call for a disapproval of the proceedings as invalid. Opinion of Attorney General, of Oct. 27, 1883, in case of Cadet Hackett. (17 Opins., 616.)

[1] 1 Greenl. Ev. § 451; Com. *v.* Shaw, 4 Cush., 594.

[2] Vol. 1, p. 244.

[3] See Hackett's Case, 17 Opins. At. Gen., 616, *ante.* It need hardly be remarked that a court-martial would not be empowered to commit or punish for contempt a witness refusing to answer under these circumstances. See Chapter XVII—"Contempts."

[4] 1 Greenl. Ev. § 451, and cases cited in note.

[5] See G. O. 29, Army of the Potomac, 1864.

[6] Roberts *v.* Allatt, 1 Mood. & Malk., 192; U. S. *v.* Smith, 4 Day, 123; People *v.* Mather, 4 Wend., 255.

[7] People *v.* Freshour, 55 Cal., 375. Nor does the protection extend to the case of an *accomplice* voluntarily testifying for the prosecution. That the *accused*, when on the stand as a witness, cannot claim the privilege *as to the offence for which he is on trial*—see Wharton, Cr. Ev. § 432.

where the answer to the question might subject the witness either to a *military or a civil* prosecution.[1]

Other Questions. The privilege under consideration cannot be asserted where the question is such that the answer will merely subject the witness to a civil action or a pecuniary liability;[2] nor can it be asserted though the answer, (while not criminating,) will tend directly to degrade or disgrace the witness,[3] unless indeed the question relate to some matter wholly collateral and irrelevant to the issue.[4] If indeed the question, (having the tendency to disgrace the witness,) refer to a fact which can properly be proved only by documentary evidence,—as the fact of a criminal conviction, or of an imprisonment or other ignominious punishment as the result of a conviction,—it is not competent, for the *special* reason that such fact can legally be established only by the record.[5] There is also another important limitation to the asking of questions that may disgrace the witness—viz. that they must be questions which, relating to comparatively recent transactions, go to his present credit as a veracious and reliable person: if they do not directly affect his credit *as a witness*, they are not properly admissible.[6]

6. Impeaching Testimony.

The credit of a witness who has been examined in chief is subject to be impeached, not only by counter evidence from the other side as well as by facts brought out in his cross-examination, but also by testimony bearing directly upon his *personal veracity.* This, which is that commonly intended by the term "impeaching testimony," is either particular or general, being (1) testimony that the witness has made specific statements, (oral or written,) out of court contrary to what he has testified on the stand; or (2) testimony attacking his general reputation as a truthful person.

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[1] Lieut. Kennon's Trial, p. 29, 41, 43; G. O. 48, Dept. of the South, 1869. See also Capt. Barron's Trial, p. 84, 98, where the rule was applied to a case of a witness who was actually under charges growing out of the same transaction, (as that which had given rise to the charge against the accused,) and was soon to be tried.

[2] 1 Greenl. Ev. § 452; Manual, 95; Story, 71.

[3] 1 Greenl. Ev. § 454.

[4] 1 Greenl. Ev. § 455; U. S. *v.* White, 5 Cranch C., 73.

[5] 1 Greenl. Ev. § 457.

[6] 1 Greenl. Ev. § 458, 459; U. S. *v.* Van Sickle, 2 McLean, 219; Davis *v.* Forrest, 2 Cranch C., 23; U. S. *v.* Masters, 4 Id., 479.

Testimony as to Contradictory Statements of the Witness. Such testimony is competent only in respect to matters which are relevant and material to the charge. To properly prepare the way for such testimony, the established procedure is, first to ask the witness, on the cross-examination, not in general terms whether he has not made a different statement, or different statements, but whether he did not on a certain occasion make a certain diverse statement, (specifying it,) to a certain person named: this, in order that he may better remember what he has said on the subject out of court, and be afforded an opportunity to correct or explain his testimony as given—a practice clearly in the interest of truth and justice.[1] This rule has been recognized in military cases.[2] Where the previous statement of the witness was in *writing*, and contained in a letter or other paper, it is not considered competent to ask him whether he has written a certain thing, stating its substance or character; the proper practice is to put the paper into his hands, or at least to exhibit to him the material portion of it, and to then ask him whether or not he wrote it.[1]

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[1] This "is an elementary principle of the law of evidence. * * * In no other way can a foundation be laid for putting in the impeaching testimony." R. R. Co. *v.* Artery, 137 U. S., 519. And see Marks *v.* Fox, 18 Fed., 713; The Queen's Case, 2 Brod. & Bing., 313; 1 Greenl. Ev. § 462. In Conrad *v.* Griffey, 16 Howard, 46, McLean, J., says:—"This rule is founded upon common sense, and is essential to protect the character of a witness. His memory is refreshed by the necessary inquiries, which enable him to explain the statements referred to, and show they were made under a mistake, or that there was no discrepancy between them and his testimony." And see McKinney *v.* Neil, 1 McLean, 540; U. S. Dickinson, 2 Id., 325. In the latter case it was held that it is not proper to call, in the first instance, *another* witness, and ask *him* if the witness intended to be impeached has not made a contradictory statement. The latter must first be asked, on the cross-examination, whether he has not made such previous statement, and if he replies in the negative, the impeaching witness may subsequently be called and interrogated as to the fact. And see G. C. M. O. 8, Dept. of Cal., 1891. It is to be noticed that the species of evidence under consideration is admitted for purposes of impeachment purely, not for proof of the previous statements. Thus in The Elvira, Gilpin, 60, the Court hold that—"A previous and contradictory statement of a witness may be given in evidence to impeach his credit, but not as proof of the facts formerly stated." Or, in other words, (p. 61,)—"You cannot substitute the other account in place of that which you have discredited, making it thus the evidence of the cause."

[2] See G. O. 31, Dept. of Dakota, 1869; G. C. M. O. 18, Div. Atlantic, 1886; Do. 8, Dept. of Cal., 1891; Do. 1, Dept. of Texas, 1891.

That the party calling the witness cannot *confirm* his original statement, (after it has been impeached by evidence of his having made a different one,) by showing that he has at other times made statements to the *same* effect as that originally given under oath —appears to be established by the weight of authority.[2]

Testimony Impeaching the General Reputation for Truth of the Witness. This is the most familiar form of attacking the credit of witnesses; a party being always permitted to impeach the testimony of a witness to the merits, introduced by the adverse party, by evidence impugning his character for veracity.[3] But this evidence must be *general*—must relate to the *general reputation* of the witness as a truthful person, at the time of his testifying;[4] for, as it is well settled, evidence of particular deceits, falsehoods, false conduct, &c., of the witness is wholly inadmissible.[5] The impeaching witnesses are not called

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[1] See 1 Greenl. Ev. § 463, 465; Murphy *v.* May, 9 Bush, 33. In G. C. M. O. 40, of 1880, the credibility of a witness was held properly impeached by the production of the record of a court of inquiry containing a different statement made by him as a witness under oath.

[2] See Ellicott *v.* Pearl, 10 Peters, 439, remarks of Story J.; Ware *v.* Ware, 8 Greenl., 42; Hurd *v.* State, 44 Miss., 731; People *v.* Doyell, 48 Cal., 85. *Contra*, see U. S. *v.* Neverson, 1 Mackey, 153.

[3] An accused party taking the stand as a witness may be impeached like any other witness. Wharton, Cr. Ev. § 433.

[4] People *v.* Haynes, 38 How. Pr., 369. The object of the testimony is to ascertain the reputation for veracity of the witness *at the time of the trial*, but it may extend over a reasonable time previous, and to different places when the domicil of the witness has been changed. Hamilton *v.* People, 29 Mich., 173.

[5] "The examination must be confined to his general reputation, and not be permitted as to particular facts; for every man is supposed to be capable of supporting the one, but it is not likely that he should be prepared to answer the other without notice." 1 Greenl. Ev. § 461. And see Teese *v.* Huntingdon, 23 Howard, 2; Wike *v.* Lightner, 11 Sergt. & Rawle, 198; Wilson *v.* State, 16 Ind., 392; Taylor *v.* Com., 3 Bush, 508; Lieut. Hyder's Trial; 157; G. C. M. O. 25, Dept. of the Colorado, 1894.

Nor—according to the weight of authority in this country—is it admissible to inquire, either as to the moral character of the witness gen-to communicate their personal knowledge in regard to his speaking or not speaking the truth,[1] or their own estimate or opinion of him as a veracious person or the reverse,[2] or knowledge of his general personal character, but his reputation or character *for truth* among his acquaintance or those conversant with him.[3] And this—what his reputation is—they must know of their own knowledge;[4] it is not sufficient for them to state what they have heard others say as to such reputation.[5] And ordinarily the impeaching witnesses should properly themselves come from the neighborhood, place of residence, military station, &c., of the witness, though it is not necessary that they should have a personal acquaintance with him.[6]

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erally, or as to particular immoral or criminal acts on his part. Teese *v.* Huntingdon, *ante;* U. S. *v.* Vansickle, 2 McLean, 219. Thus it has been held that it cannot be asked, for the purpose of impeaching a female witness, whether she was not a prostitute. Spears *v.* Forrest, 15 Vt., 435; Com. *v.* Churchill, 11 Met., 538; U. S. *v.* Dickinson, 2 McLean, 329. So, evidence that he was a deserter from the army has been held not to be admissible to impeach the character for veracity of a witness in a criminal court. Foley *v.* People, 22 Mich., 227. That "proof of a conviction or sentence for desertion, or other military crime," does not "affect the credibility of a witness by impeaching his veracity"—see G. C. M. O. 45, Dept. of Cal., 1883.

[1] People *v.* Methvin, 53 Cal., 68.

[2] Kimmel *v.* Kimmel, 3 Sergt. & Rawle, 336. "The court erred in admitting" impeaching testimony "based upon the individual opinion of the witness derived from specific acts of the accused, and not upon his general reputation for truth and veracity." Gen. McCook, G. C. M. O. 28, Dept. of Arizona, 1892.

[3] Douglass *v.* Tousey, 2 Wend., 354; Teese *v.* Huntingdon, *ante*; Kimmel *v.* Kimmel, *ante;* Wike *v.* Lightner, *ante;* G. C. M. O. 128, Dept. of Dakota, 1882.

[4] "That knowledge of character which is gained from report cannot be considered as *secondary*, for report constitutes character." Gibson J. in Kimmel *v.* Kimmel, *ante.* And see G. C. M. O. 44, Dept. of the Platte, 1892.

[5] Kimmel *v.* Kimmel, *ante;* Vernon *v.* Tucker, 30 Md., 456. Such evidence would be mere *hearsay.* Douglass *v.* Tousey, *ante.*

[6] Kimmel *v.* Kimmel, *ante.* "There is danger from the proneness so often observable in witnesses to substitute their own opinion for that of the public, whose judgment cannot be so readily warped by prejudice or feeling as that of an individual; and hence the policy of not requiring any intimate degree of knowledge respecting the person himself, or of bringing the witness too close to the scene." Id. (Gibson J.)

Procedure. The most approved *form* of the direct examination of an impeaching witness is simply to ask him if he knows the general reputation of the adverse witness for veracity,[1] and, if he answers in the affirmative, to ask him further to state what that reputation is.[2] In the English and in some of the American courts the practice has been to allow the further question, whether, knowing such reputation, he would believe the adverse witness under oath. But this question, though sometimes permitted to be asked upon military trials, is one which seems not to be encouraged by the weight of authority in this country,[3] inasmuch as it calls for the individual estimate of the witness—a thing to be avoided in this proceeding—and invites an answer liable to be influenced by personal hostility or prejudice.[4]

The impeaching witness having given unfavorable testimony, remains subject to be *cross-examined* by the other party as to the means and sources of his knowledge. He is generally called upon to specify the particular individuals whom he has heard speak unfavorably of the truthfulness of the witness attempted to be impeached, and may be interrogated as to the grounds upon which they based their opinions.[5] The adverse party may in turn impeach the impeaching witnesses, or—as is oftener done—he may support the general character for veracity of his own original witness by testimony showing it to be good.[6]

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[1] "General reputation *for veracity*," (or "*truth*," or "*truth and veracity*;") not "general reputation"—without qualification. Wilson *v.* Young, 31 Wisc., 574. "Reputation" is a better word than "character." Knode *v.* Williamson, 17 Wallace, 586.

[2] Or the two questions may be consolidated—"Do you know his general reputation for veracity, and if so what is it?"

[3] See 1 Greenl. Ev. § 461; Teese *v.* Huntingdon, *ante;* Phillips *v.* Kingsfield, 19 Maine, 375; People *v.* Methvin, 53 Cal., 68; People *v.* Ramirez, 56 Cal., 533.

[4] See Phillips *v.* Kingsfield, *ante.*

[5] "On the cross-examination, the inquiry may extend to the witness' opportunity for knowing the character of the other witness, for how long a time and how generally the unfavorable reports have prevailed and from what persons he has heard them." Phillips *v.* Kingsfield, *ante.* The impeaching witness may be asked, on cross-examination, not only the *names* of the persons whose statements have made up the general reputation to which he has testified, but *what they said.* Annis *v.* People, 13 Mich., 11. And see Bates *v.* Barber, 4 Cush., 107; 1 Greenl. Ev. § 461.

[6] See 1 Greenl. Ev. § 461; Manual, 90. In Bunnell *v.* Butler, 23

7. Testimony as to Good Character.

Admissibility of in Defence, on Criminal Prosecutions. It may be regarded as settled law that evidence of good general character, as possessed *prior to* the commission of the alleged offence,[1] may be introduced by the accused as part of his defence, provided the character shown is of such a nature that it may properly weigh with the jury in determining the issue involved in the case. Whether the evidence be deemed admissible as pertinent to the question of criminal intent,[2] or as sustaining the original presumption of innocence,[3] or as a fact going to show that it is unlikely that the accused could have committed the crime and thus contributing to a reasonable doubt upon the whole case,[4]—it is in general admitted if it be in any degree apposite to the species of criminality charged. Thus while a general reputation as a moral well-conducted person and law-abiding citizen would be admissible in evidence upon criminal trials in general, a character for peaceableness would not be apposite to the defence in a case of larceny, though it might be entirely apposite under an indictment for violent homicide.[5]

Evidence as to character is sometimes referred to as especially significant in *doubtful* cases;[6] but, where otherwise admissible, neither the nature of the offence nor of the proof on the merits can properly affect its competency.[7] It will possess little or no

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Conn., 65, it is held that the court "may, in its discretion, limit the number of impeaching witnesses," and that "the proper exercise of such discretion is no ground of error." And in this case the number was limited to *six* on each side. In People *v.* Murray, 41 Cal., 66, it was held not error to have limited the impeaching witnesses to *eight.*

[1] Evidence of good character sustained *after* the commission of the offence is of course not admissible. Graham *v.* State, 29 Texas, Ap. 31.

[2] 1 Greenl. Ev. § 54, note; 3 Id. § 26.

[3] 1 Bishop, C. P. § 1112; Manual, 64.

[4] See Wharton, Cr. Ev. § 57. It is deemed to have more force where the proof is circumstantial than where it is direct and positive. U. S. *v.* Babcock, 3 Dillon, 620.

[5] See 2 Russell, 784; 1 Greenl. Ev. § 55; 3 Id. § 25; Wharton, Cr. Ev. § 60; 1 Bishop, C. P. § 1113; Cathcart *v.* Com., 37 Pa. St., 108. In People *v.* Garbutt, 17 Mich., 9, a case of homicide, evidence that the accused, when in the army, was reputed a good and brave soldier was held inadmissible.

[6] See U. S. *v.* Means, 42 Fed., 599.

[7] Wharton, Cr. Ev. § 66; 1 Bishop, C. P. § 1115.

weight, however, when the guilt of the accused is plainly shown by the testimony.[1] Where offered, it must be evidence of *general* character or reputation:[2] particular acts of good conduct are not admissible.[3]

This testimony is admitted, subject, like any other, to cross-examination.[4] It may also be rebutted by evidence of bad character; but such evidence cannot include particular acts or conduct, but must be as general as that to which it replies.[5]

It is settled law, however, that the general character of the accused cannot be attacked until he has himself first introduced evidence to sustain it, or—in the language of Wharton[6]—"unless the defendant puts his character in issue, the prosecution cannot call witnesses to impeach it."

It is also well settled that the fact that the accused offers, in his defence, no evidence in support of his general character, can furnish in law no unfavorable influence or impression against him—can afford no presumption, however weak, either "that he is guilty of the offence charged, or that his character is bad."[7]

In military cases. At military law, evidence of character, which is always admissible,[1] is comparatively seldom offered strictly or exclusively *in defence;* but, when introduced, is usually intended partly or principally, *as in mitigation of the punishment* which may follow upon conviction. With this view it is presented not only in connection with a plea of "guilty," but as a precautionary measure where the plea is "not guilty," and both where the sentence is discretionary and where it is mandatory. Thus offered, it is not subject to the rules which restrain the scope and quality of such testimony when defensive merely. It need have no reference to the nature of the charge, but may exhibit the reputation or record of the accused in the service, for efficiency, fidelity, subordination, temperance, courage, or any of the traits or habits that go to make the good officer or soldier. It also need not be limited to *general* character, but may include particular acts of good conduct, bravery, &c. It may also be either oral or written; consisting, if the latter, of testimonials from superior officers, recommendations for promotion, honorable mention in orders, awards of medals of honor, certificates of merit, warrants as non-commissioned officers, honorable discharges, &c., of which the originals or copies should be appended to the record of trial. Such evidence, in the event of conviction, may avail to lessen the measure of punishment if the same be discretionary with the court; if mandatory it may form the basis of a recommendation by the members and a mitigation or pardon by the reviewing officer. So much a matter of course is the admissibility of evidence of good character on a military trial, that, where the same exists, the accused should be allowed all reasonable facilities for obtaining it: where it cannot be procured without too considerable a delay or other embarrassment to the service, the fact of its existence and its substance will in general properly be formally admitted of record, by the prosecution.

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[1] U. S. *v.* Jackson, 29 Fed., 503; U. S. *v.* Jones, 31 Fed., 718.

[2] "In view of the fact that 'the best character is generally that which is the least talked about,' the courts have found it necessary to permit witnesses to give *negative* evidence on the subject, and to state that they 'never heard anything *against*' the character of the person on whose behalf they have been called." Wharton, Cr. Ev. § 58.

[3] Wharton, Cr. Ev. § 60; 1 Bishop, C. P. § 1117.

[4] In a case in G. C. M. O. 66 of 1875, a witness for the defence, having testified that the character of the accused was good, was asked, on cross-examination, by the judge advocate—"Whom have you heard give the accused a good character?" To this question an objection was made, and was sustained by the court. *Held* by the Secretary of War that the objection "should have been overruled."

[5] "Particular good or bad acts * * * * cannot be shown in proof or rebuttal of good character." 1 Bishop, C. P. § 1117.

[6] Cr. Ev. § 64. And see this principle recognized in G. O. 112, Dept. of the Mo., 1863; Do. 11, Dept. of the Susquehanna, 1864; Do. 65, Div. of the Atlantic, 1864; Do. 29, 1st Mil. Dist., 1867; Do. 40, Dept. of the South, 1870; Do. 52, Dept. of the Platte, 1871; G. C. M. O. 58, Dept. of Texas, 1872; Do. 10, Id., 1882; Do. 20, Dept. of the Mo., 1890.

[7] Wharton, Cr. Ev. § 62. And see 1 Bishop, C. P. § 1119; People *v.* Bodine, 1 Denio, 282.

Rebutting evidence of bad character, in military cases, may be of similar form and nature to the evidence introduced of good character.[2]

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[1] While in the American and the British military practice evidence of character and record is introduced by the accused, in the French the Government puts in the military history, (*état des services,*) of the accused at the beginning of every trial. See, for example, Le Procés Bazaine, Moniteur edition, Paris, 1873, page 3.

[2] See G. C. M. O. 88, (H. A.,) 1886.

IV. Testimony by Deposition.

Article 91. The written military law in regard to Depositions is comprised in the present 91st Article of war—originally s. 27, c. 75, Act of March 3, 1863—as follows: "*The depositions of witnesses residing beyond the limits of the State, Territory, or district in which any military court may be ordered to sit, if taken on reasonable notice to the opposite party and duly authenticated, may be read in evidence before such court in cases not capital.*" The effect of this statute is deemed to be, not merely to indicate when depositions shall be admissible as evidence, but to *entitle* parties, in cases within the Article, to have depositions "read in evidence." If, therefore, the deposition be in proper form, and material as testimony, the court cannot refuse to receive and consider it.

In all cases except where a question of identity is at issue, depositions of *distant* witnesses may in general well be substituted for personal testimony.

Construction of the Article.—*"The depositions of witnesses."* In the earlier provision on this subject—Art. 74 of the code of 1806—the term "witnesses" was qualified by the words, "not in the line or staff of the army," and practically included civilians only.[1] The present Article, containing no such qualification, is held to authorize the admission in evidence of depositions of military as well as civil persons, and such has been its construction in practice. When officers or soldiers are stationed at remote points where their services cannot well be dispensed with, their evidence is commonly obtained by deposition; and this course is also in general pursued where the testimony of officials at Washington, (as chiefs of the staff corps,) is required at distant trials.

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[1] It is remarked on Gen. Pillow's Court of Inquiry, p. 375, that the provision of 1806 was restricted to *civil* persons because such could not (then) legally be required, (as now by Sec. 1202, Rev. Sts.,) to attend as witnesses before courts-martial.

It may be noted that in the earliest provision on this subject—the original of the present Article in our law, *viz.*, a Resolution of Congress of Nov. 16, 1779, there is no such restriction, the statute providing in general terms—"That in cases not capital in trials by court-martial, depositions may be given in evidence," &c. 3 Jour. Cong., 392.

"Residing beyond the limits of the State," &c. The Article, in providing for the admission of depositions taken under certain specified conditions, must be regarded as excluding them where these conditions do not exist.[1] Thus depositions of persons residing *within* the limits indicated are not admissible,[2] and cannot be read in evidence, *though the parties may consent.*[3] On the other hand, the Article authorizes the admission of a deposition of a witness residing in a *foreign* country. The term "residing," as applied to *military* persons on the active list, is ordinarily to be construed as equivalent to *stationed* or *on duty.*

"If taken on reasonable notice to the opposite party." What shall be "reasonable notice" is not indicated by law or regulation,[4] nor has the practice established any general rule on the subject. The period should depend mainly on the nature and importance of the case, the extent and materiality of the testimony sought, the situation of the opposite party, the existing status whether of peace, war or other emergency, &c. In general, all that the notice is really needed for is to afford the party sufficient time within which, (in consultation with his counsel, if he has any,) to examine the interrogatories, note objections, (if desired,) and prepare cross-interrogatories. For this a few days will ordinarily be a "reasonable" period.

The notice may be given, under the Article, at any time after the issuing of the order convening the court at a certain place named; for till the order is made it cannot be determined whether any particular witness whose deposition is proposed to be taken is a person "residing beyond the limits of the State,

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[1] See 2 Opins. At. Gen., 344; Gilchrist, 24.

[2] G. O. 32, Dept. of Cal., 1866; G. C. M. O. 102, Dept. of the East, 1871; Do. 1, Div. of the South, 1875; Do. 10, 22, Dept. of the Mo., 1891.

[3] The fact that a civilian residing at the post where the court was convened has temporarily gone beyond the limits of the State, so that his personal attendance cannot be secured, will not make his deposition admissible. G. C. M. O. 44, Dept. of the Mo., 1887.

[4] The only statute in which a period of notice has been prescribed was the Resolution of Dec. 24, 1779, (3 Journals, 415,) where it was made to depend on the distance between the residence of the witness and that of the opposite party, with a view to enable him to be present, or represented, at the examination. In the present practice it is comparatively rare that either party is thus present or represented. See *post*—"Procedure."

&c., in which the court is ordered to sit," and therefore one whose deposition can legally be "read in evidence" in the case. The notice may thus be given, (and the deposition, if there is time, be taken,) prior to the assembling and organization of the court. In practice, the taking of depositions is not unfrequently initiated before the arraignment; and it is sometimes resorted to at a much later stage. Where, pending the trial, a deposition is desired to be obtained, the court will, if necessary, properly grant a continuance to await the arrival of the testimony.

A deposition taken without notice, or without reasonable notice, should, if objected to, be ruled out as inadmissible.[1] A deposition taken without notice is indeed no more than an *ex parte* affidavit; and affidavits, or statements of persons not subjected to cross-examination, are of course, as already observed, entirely incompetent as evidence before courts-martial.[2]

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[1] In a peculiar case published in G. C. M. O. 9 of 1879, it was held by the Judge Advocate General that a certain deposition was inadmissible as taken without notice, the witness being a person who, without the concurrence of the opposite party, had been substituted for the original intended deponent. See DIGEST, 105. In a case in G. C. M. O. 45, Div. of the Pacific & Dept. of Cal., in which a deposition was objected to as taken without notice, it was remarked by the reviewing authority that a statement, added by the judge advocate at the end of the Interrogatories, that the prisoner had no cross-interrogatories to ask, was no proof of notice, being merely an *ex parte* declaration.

[2] It has been repeatedly so held in Orders. See G. C. M. O. 33 of 1873; Do. 133, Dept. of the Mo., 1871; G. O. 21, Id., 1863; Do. 17, Dept. of Ark., 1866; Do. 19, Third Mil. Dist., 1867; Do. 49, Dept. of Dakota; 1871; Do. 165, Id., 1882. In a case in G. C. M. O. 37, Dept. of the East, 1870, where the court admitted in evidence the affidavit of a witness sick at the post, instead of adjourning to his quarters to take his testimony, its action was disapproved by the reviewing authority. In G. C. M. O. 19, Dept. of Texas, 1873, a letter from a post adjutant, introduced in evidence, was held improperly admitted, being, though official, a mere *ex parte* statement. In G. C. M. O. 84, Dept. of the Mo., 1882, certain *ex parte* statements, contained in a record of a board of survey, were held improperly admitted in evidence upon a trial by court-martial.

Affidavits, however, have sometimes been admitted by the court in the absence of objection by a party. On Maj. Gen. Arnold's trial, (1779,)—the most marked instance met with by the author—they were admitted freely on both sides. See pp. 20, 37, 55, 63, 77. But, notwithstanding the consent of the parties, a court-martial could rarely, if ever, with safety receive evidence of this character, which must in general be too incomplete to serve as a reliable basis either for its own judgment or the action of the reviewing officer.

The objection, however, to a notice as *not reasonable* would properly come from the adverse party rather than from the court.[1] Such party may, if he see fit, (the requirement as to notice being for his benefit,) *waive* any objection that he might make on the ground of insufficient notice, and upon such waiver the deposition, (if otherwise in conformity with the Article,) will be admissible in evidence.

"And duly authenticated." The earlier statutes—from the Resolution of December 24, 1779, to Art. 74 of 1806—provided that the deposition should be taken "before some justice of the peace." The present Article not designating any person as proper to act as commissioner, it is clear that any official who, by the laws of the United States,[2] or of the State, &c., is authorized to administer oaths, may qualify the witness and authenticate, by his official signature, and seal if he has one, the deposition.[3] And now, under the recent Act of July 27, 1892, the witness may be sworn, and the deposition "authenticated" by the judge advocate of a department or of a court-martial, or by the trial officer of a summary court. If a deposition be not duly authenticated, it is wholly inadmissible in evidence.[4]

Where the business of procuring a deposition to be taken is committed to a particular officer of the army, he will properly, by an official *certificate* to that effect, further authenticate the deposition as having been duly taken.[5]

"May be read in evidence." This does not mean that the entire deposition as taken shall necessarily be admitted in evidence, but that it shall be admitted subject to such objections for immateriality, irrelevancy, &c., as may have been noted or may be raised upon its being read, to the questions or answers. In other words, it is to be read and received subject to the same exceptions as would be the oral testimony for which it is a substitute.

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[1] If, indeed, he is ignorant, the court, on perceiving no indication in the deposition papers, that due notice was given, may and should advise him as to his right to object.

[2] See Sec. 863, Rev. Sts.

[3] Lieut. Kennon's Trial, (Navy,) p. 16. Notarial fees. &c., are payable by the Quartermaster Department. Circ. No. 9, (H. A.,) 1886.

[4] G. O. 37 of 1889; Circ., July 22, 1889; G. C. M. O. 33, Dept. of Dakota, 1891.

[5] See *post*—"Procedure;" and form in Appendix.

A deposition, in a case within the Article, should not be rejected for a mere *informality*. If complete—if it contains the entire testimony, under oath or affirmation, of the witness, in response to all the material interrogatories, and is duly authenticated—it should be admitted.[1]

The party by whom the deposition was initiated may omit to offer it, but has no right absolutely to withhold it merely because the testimony given is not favorable or such as was expected. Nor can he introduce only such parts as are favorable or useful to him, omitting the rest. He must offer it as a whole or not at all. And if *he* does not offer it, the other party may do so if he chooses: if neither offers it, it is not read and forms no part of the proceedings,[2] unless possibly the court may require the same for its information or the elucidation of the case.[3]

"In cases not capital." Defining "capital" as *punishable capitally*,[4] it results from this limitation that depositions cannot be read in evidence in cases of spies, of deserters (or of officers or soldiers advising or persuading desertion) in time of *war*, or of persons charged with any of the offences specified in Articles 21, 22, 23, 39, 41, 42, 43, 44, 45, 46, 56, and 57, or in Art. 58 when made capital by the local law. This limitation is regarded as absolute, and it is held that a deposition cannot legally be introduced in evidence in a capital case by either party, even if the other party waives objection to its admission.[5]

Procedure. In the absence in the military law of any provisions, (such as those in the statutes of the United States[6] and of the several States,) regulating the taking and using of depositions, the military procedure in this respect has not been uniform, and the depositions themselves have often been inartificially made up.

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[1] Fuller *v.* Rice, 4 Gray, 343. And see Gartside Coal Co. *v.* Maxwell, 20 Fed., 187.

[2] See Pelamourges *v.* Clark, 9 Iowa, 2; Wheeler *v.* Smith, 13 Id., 564; Nash *v.* State, 2 Greene, 287; DIGEST, 104, 105.

[3] See G. C. M. O. 92, Div. Atlantic, 1889.

[4] See Imperial Dictionary—"Capital." This is the sense uniformly ascribed, in this treatise, to the word as used in the Articles generally, and this is the sense attributed to it in the practice of the service.

[5] 2 Opins. At. Gen., 344.

[6] See Rev. Sts., Secs. 863–870.

A deposition may be taken—as sometimes in civil cases—by both parties appearing, personally or by counsel, before the designated commissioner or officer, and propounding questions to the witness. This course, however, is rarely pursued in military cases.

In general, in such cases, the taking of a deposition is initiated substantially in one of the two following forms:

1. The party desiring the testimony of a certain distant witness, whose personal attendance cannot, as it has been ascertained, well be secured, serves upon the opposite party a notice in writing, to the effect that the deposition of the witness will be taken at a certain time and place and by a certain officer or person named,[1] or—as it is more commonly expressed—by such officer or person and at such time and place as shall be designated by the proper superior authority, upon the Interrogatories annexed to the notice and such Cross-Interrogatories as the party notified may present; and desiring him to serve a copy of the latter upon the party giving the notice within a reasonable time. The party notified transmits in due time to the other party a draft of his Cross-Interrogatories, if he wishes to propose any, (with his objections, if he desires to note any at this stage, to the Interrogatories,) and the original party, similarly, if he sees fit, may note his objections to the Cross-Interrogatories. The judge advocate thereupon duly forwards the whole to the person who is to take the deposition, or, if no such person has been designated, to the proper military authority, (Department Commander, General Commanding the Army, or, through the Adjutant General, to the Secretary of War,) for such designation or orders. Objections need not be thus noted on the sets of Interrogatories, but may, and generally are, left to be raised at the trial. The original party, before forwarding, may add *re-direct* Interrogatories, (serving a copy on the opposite party,) if he thinks it desirable.

2. Or, as is by far the preferable mode where practicable to adopt it, the parties—the accused and judge advocate—enter into

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[1] An officer of the army is in general to be preferred, since, if a *civil* commissioner is employed, an indebtedness for *fees* will ordinarily be incurred.

and subscribe a written STIPULATION,[1] by which it is agreed that the deposition of the witness shall be made and forwarded by him directly, or shall be taken by a particular officer mentioned or an officer to be designated for the purpose by the proper superior,—upon certain annexed Interrogatories agreed upon by the parties jointly, (or Interrogatories and Cross-Interrogatories contributed by them respectively where they cannot thus agree,) subject to such objections either to questions or answers as either party may properly raise before the court.

The Stipulation is itself evidence of "reasonable notice" given, and is a waiver of any irregularities that may have attended the proceeding. It may well include an agreement that the deposition when returned shall first be opened by the president of the court in the presence of the court and of the parties.[2] The stipulation, with the appended Interrogatories, should be forwarded by the judge advocate, either to the witness directly, or to the officer named, or to the Commander for his action—according to the agreement of the parties.

In forwarding the Interrogatories, the judge advocate should include a proper subpœna or subpœnas for the witness or witnesses, according to the regulation on the subject prescribed in General Orders.[3]

Where the Interrogatories have been forwarded to the witness directly, he will proceed to make in writing under oath[4] his answers thereto, and will thereupon return the whole to the president of the court, or other officer or person as stipulated or requested. Where the witness is *an officer of the army*, the forwarding of the Interrogatories thus directly, with a view to his making up and returning the deposition similarly directly, may often be the preferable course of proceeding. The usual practice, however, is both to forward and return through the proper military headquarters.

Where the Interrogatories have been forwarded directly, or through military channels, to an officer or other person, as a commissioner or agent to take or cause to be made the deposition, such officer will proceed to meet or communicate with the witness as soon as practicable, and to take or procure in writing his sworn answers *seriatim* to the interrogatories as propounded by the parties or party. These, being signed and duly certified as sworn to, are, with such documents or other writings as may have been called for from the witness or referred to in his answers, appended to the Interrogatories, and the Deposition thus made up, being authenticated by the certificate of the officer, &c., as duly taken, is, together with the order or orders, if any, exhibiting the authority of the officer, forwarded by mail or otherwise to the headquarters of the proper commander for transmission to the court, or directly to the president of the same, as may have been stipulated or directed.

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[1] See form in Appendix.

[2] See *post.*

[3] Circ. No. 3, (H. A.,) 1888.

[4] Witnesses, in making their depositions, have sometimes sworn to the same at the end, *i. e.* after all the answers have been given. The regular course is to be sworn at the beginning, as other witnesses are sworn under Art. 92.

The deposition, it may be remarked, whether returned directly or through military channels, is properly transmitted or delivered to the president of the court rather than to the judge advocate, the latter being commonly a *party* to the proceeding. The deposition, to whomever forwarded, should properly be *first opened in court and in the presence of both parties.*[1] When opened it should be delivered to the party at whose instance it was taken—accused or judge advocate—to be "read in evidence."

It is directed in Circular, No. 9, (H. A.,) of 1888, that—"*When the deposition has been returned to the court, together with the subpœna, then the judge advocate should prepare and sign the usual certificates of attendance and transmit them to the witness, with duplicate copies of the order convening the court. The fact of the attendance and the length of the same is to be ascertained from the deposition.*" The subpoena, copy of the convening order, and judge advocate's certificate, constitute the evidence upon which the witness will be enabled to receive his fees, &c., from the Pay department of the Army, which will pay the same out of the annual appropriation "for compensation of witnesses attending upon courts-martial." A civilian witness who attends to give his deposition is entitled to the same "fees and expenses,"

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[1] It has been held a fatal objection to a deposition that it was opened out of court. Beale *v.* Thompson, 8 Cranch, 70. Such objection, however, may be waived by the interested party, and the deposition admitted in evidence in the discretion of the court.

(authorized by the Army Regulations, Art. LXXVI,) as if he had attended personally before the court.[1]

V. THE CREDIBILITY AND WEIGHT OF ORAL TESTIMONY.

In addition to what has been remarked on this subject under the foregoing Titles, there may further be noted certain legal rulings and practical considerations, as of value to the court in estimating the abstract importance and relative force of testimony in connection with its Finding.

The Testimony of Accomplices. While the testimony of an accomplice, if believed, may be sufficient, though unsupported, to warrant a conviction, it is agreed by the authorities that, as a general rule, such testimony cannot safely be accepted as adequate for such purpose unless corroborated by reliable evidence.[2] It need not indeed be confirmed as to all its parts: if sustained as to some material and important points, it may in general be credited as to others.[3] It is held, however, that the corroboration must certainly extend to the *identity*, (where that is in question,) of the person of the accused.[4]

Testimony as affected by imperfect veracity or by discrepancy. Even where the character for veracity of a witness is shown to be bad, his testimony is not necessarily to be altogether disregarded, but is to be considered in connection with the rest of the evidence, and such credit given to it as it may be found justly entitled to.[5]

So where a witness is shown to have testified falsely to a certain particular, the maxim *falsus in uno falsus in omnibus* is not necessarily to be applied, nor is all his testimony necessarily to be disregarded. The presumption against his general veracity will indeed be strong where the false statement relates to some matter as to which he can scarcely be liable to mistake; still, though the falsity may be such as to discredit him in general, it does not follow that some portions of his testimony may not be true.[1]

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[1] Circ. No. 9, (H. A.,) 1883.

[2] 1 Greenl. Ev. § 380; Wharton, Cr. Ev. § 441; 1 Bishop, C. P. § 1169; U. S. *v.* Kessler, Baldwin, 22; U. S. *v.* Lancaster, 2 McLean, 431; U. S. *v.* Troax, 3 Id., 224: Steinham *v.* U. S., 2 Paine, 168; U. S. *v.* Harries and Smith, 2 Bond, 311, 323; U. S. *v.* Babcock, 3 Dillon, 619; G. O. 14, Dept. of Dakota, 1868. That the rule in regard to accomplices does not apply to *informers*, see 1 Greenl. Ev. § 382; U. S. *v.* Patterson, 3 McLean, 53, 299.

[3] U. S. *v.* Kessler, *ante;* U. S. *v.* Reeves, 38 Fed., 404; U. S. *v.* Lancaster, 44 Fed., 896; U. S. *v.* Ybanez, 53 Fed., 536.

[4] See Wharton, Cr. Ev. § 442.

[5] State *v.* Miller, 53 Iowa, 209.

Falsehood and disingenuousness in witnesses are, as has been remarked, in practice not unfrequently indicated by their avoidance of particularization in their testimony. "Fabricators," writes Wharton,[2] "deal usually with generalities, avoiding circumstantial references which may be likely to bring their statements into collision with other evidence; and hence it is properly held that a studied avoidance of details, by witnesses, throws suspicion on their statements. This, however," it is added, "depends upon the object to be recalled;" it being not to "events of remote date," but to "matters which the witness, under ordinary circumstances, would remember," that the test most "fairly applies."

The testimony of a witness should not be regarded as impeached by the fact that his statement differs from those of other witnesses as to the secondary details of an occurrence, nor by the fact that others who were present did not hear or see what he states to have been said or done.[3] Discrepancies as to minor matters rather tend to sustain the credit of witnesses, as indicating the absence of concert.[4] And the perceptive powers, as well as the capacities and opportunities for observation, of witnesses, are so diverse that it is quite possible and natural that acts or words sworn to by one witness should have escaped the notice of another present at the same time and place.[5] So, the positive testimony of a witness as to a particular fact in a case, which was certainly within his knowledge, should not be regarded as necessarily discredited by his failure to recall other facts in the case or by his contradictory or confused statements in regard to the same.[1]

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[1] Wharton, Cr. Ev. § 380; The Santissima Trinidad, 7 Wheaton, 339; Hall *v.* Renfro, 3 Met. (Ky.,) 51; State *v.* Brantley, 63 No. Ca., 518; Shellabarger *v.* Nafus, 15 Kans., 547.

[2] Cr. Ev. § 389. On the other hand, an over-minute specification of details, especially as to remote events or unimportant matters, does not add to the credit of a witness, but rather the reverse. Id.; O'Brien, 219.

[3] Bogle *v.* Hammons, 2 Tenn., 137.

[4] See Simmons § 986; O'Brien, 221.

[5] Note the excellent observations of McCormick, J., on the credibility of testimony, in U. S. *v.* Hughes, 34 Fed., 734-5.

Affirmative and Negative Testimony. As remarked by the U. S. Supreme Court in an adjudged case:[2]—"It is a rule of evidence that, ordinarily, a witness who testifies to an affirmative is entitled to credit in preference to one who testifies to a negative, because the latter may have forgotten what actually occurred, whereas it is impossible to remember what never existed." Again the negative witness may not have "forgotten," but may simply have failed to perceive what has really occurred in his presence or near him. Of two equally honest witnesses, the one, from a superior faculty of discernment, or a superior opportunity for informing himself, or both, may have become cognizant of facts to which he can testify affirmatively, while the other, when interrogated as to the same matter, can only reply that he did not see or hear, or does not know, &c.; yet each will be a truthful witness. A witness may also have been mentally preoccupied at the time of the occurrence in question; or, for fear of involving himself or otherwise, he may have been unwilling to take notice of what was passing: in such cases also his testimony may be true, though of a negative character and of inferior relative weight.

Testimony of the Accused. In a case of importance in which the accused takes the stand as a witness in his own behalf, it may be embarrassing to determine exactly how far he is to be believed. His credibility will be subject to question oftener perhaps for the reason that it is not natural to expect an uncolored statement from a person charged with crime, than for the reason that he is to be supposed to have wilfully stated what is false. His *interest* in the case is "greater than that of any other witness" and therefore "may seriously affect the credence that shall be given to his testimony."[3] Such testimony will always be fair material for a rigid cross-examination, and, as it has been observed by the U. S. Supreme Court, "a greater latitude is undoubtedly allowable in the cross-examination of a party who places himself on the stand than in that of other witnesses."[1] How successfully he may endure this test is a circumstance which will be most material in measuring his credibility;[2] but probably the safest general rule to apply to his evidence as a whole—at least where a *prima facie* case has already been made out against him by the prosecution—will be that entire credit should not be given to his statements except in so far as he is corroborated by unprejudiced witnesses or reliable written testimony.[3]

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[1] McClaskey *v.* Barr, 54 Fed., 781.

[2] Stitt *v.* Huidekopers, 17 Wallace, 384. And see Au *v.* R. R. Co., 29 Fed., 72; Wharton, Cr. Ev. § 382. "The testimony of a series of witnesses, for instance, that they never saw a party drunk, does not outweigh the testimony of others to the fact of his drunkenness on particular occasions, unless those speaking to the negative cover the same point of time as those speaking to the affirmative." Wharton, Cr. Ev. § 382, citing Murphy *v.* People, 90 Ills., 59.

[3] Reagan *v.* U. S., 157 U. S., 301, 310.

Number of Witnesses. The relative number of the witnesses for the prosecution and the defence, though a material factor where the number on one side very considerably exceeds that on the other, is by no means decisive in general. The relative weight of testimony depends much less upon the number of the witnesses than upon the quality of their statements. Evidence is valuable according as it is the expression of such concomitants as superior intelligence, capacity of appreciation, habit of observation, and opportunity for acquiring knowledge, and a single witness in whose case these incidents concur will properly outweigh several less well qualified and informed witnesses.[4]

Manner of the Witness. That the manner of the witness on the stand—his appearance, demeanor, style of expressing himself, &c.—is proper to be considered in connection with his testimony as adding to or detracting from his credibility and relative weight, is a point frequently noticed by the authorities.[1] Where for example, the bearing of a witness is such as to indicate that he is simply making a statement of the facts within his knowledge and observation, uninfluenced by interest or personal feeling, his testimony will carry very considerably more weight than where it is apparently colored by resentment or prejudice, or where, unconsciously perhaps to himself, he speaks as a partisan of the side on which he is called. So a reluctant and overcautious witness, or a "willing" or "fast" one, is in general less to be credited than one whose evidence is neither calculated nor impulsive, who is frank without being florid or diffuse. So too a clear and self-possessed witness will ordinarily make a better impression than an agitated or confused one. At the same time it is unquestionable that a perfectly reliable and truthful witness will not unfrequently fail to do himself justice from natural embarrassment or a lack of fluency, and that diffidence and hesitation on the stand are as often characteristics of an honest as of a dishonest witness.[2]

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[1] Rea *v.* Missouri, 17 Wallace, 542.

[2] Some inference may perhaps also be drawn from the manner in which his *direct* examination is conducted. Thus where a party "was examined as a witness in his own behalf, yet his counsel forbore to interrogate him" as to certain conduct charged against him and especially material in the case, it was held that "the natural and irresistible inference from this omission was that the party was conscious of the truth of the charge and was too honest to deny it if he had been examined concerning it." McCall *v.* McDowell, Deady, 243.

[3] See Reagan *v.* U. S., *ante.*

[4] See Sibley *v.* Ins. Co., 9 Bissell, 31; Taylor *v.* Harwood, Taney's Dec., 437; Randolph *v.* Lane, 57 Ind., 115; McCrum *v.* Corby, 15 Kans., 117; G. C. M. O. 3, Dept. of the Mo., 1884. "Witnesses cannot be treated as units, to be divested of their own distinctive claims to credit. It may well happen that one intelligent and honest witness may outweigh several who are ignorant or unreliable. Nor should it be forgotten that one witness, corroborated by facts or documents, may outweigh a multitude whose testimony may have been the result of imperfect observation or have been influenced by prejudice." So it may happen that the evidence of a witness who is entirely unsupported may be such as properly to outweigh that of another whose statements are corroborated. Canada *v.* Curry, 73 Ind., 246.

A court-martial, by reason of the superior education and intelligence of its members, is a species of jury which should be peculiarly qualified for the discriminations and comparisons necessary to be made in estimating the relative weight and credibility of oral testimonies.[3]

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[1] U. S. *v.* Cole, 5 McLean, 514; Johnson *v.* U. S., 157 U. S., 675; Dickenson *v.* Gore, Newberry, 415; Callanan *v.* Shaw, 24 Iowa, 441; Stokes *v.* Mowatt, 1 U. S. Law Jour., 325; Tytler, 262; Simmons § 573; Kennedy, 173–5; Napier, 103; De Hart, 150; 18 Opins. At. Gen., 119.

[2] "Equally truthful men often speak in very different ways about the same transaction, one with perfect confidence and the other with doubt and hesitation. One will say—'It was,' and the other—'I think it was.' A jury is bound by neither statement, but may credit either. * * * * It does not follow that a jury must credit the former in preference to the latter." Muscott *v.* Stubbs, 24 Kansas, 520, 522.

[3] Upon the subject of the credibility of witnesses Dillon J., in U. S. *v.* Babcock, 3 Dillon, 619–620, expresses himself as follows:—"The degree of credit due to a witness should be determined by his character and conduct; by his manner upon the stand; his relation to the controversy and to the parties; his hopes and fears; his bias or impartiality; the reasonableness or otherwise of the statements he makes; the strength or weakness of his recollection viewed in the light of all the other testimony, facts and circumstances in the case." And see Huchberger *v.* Ins. Co., 4 Bissell, 265.

IV. WRITTEN TESTIMONY.

This subject will be considered under the Titles of—I. Public Writings; II. Private Writings.

I. PUBLIC WRITINGS.

These may be divided into—1. Judicial Records; 2. Other Public Documents.

1. Judicial Records—***Records of civil tribunals.*** Records of courts of the United States or of the States will rarely be required to be offered in evidence on military trials. Occasion, however, may occur for such evidence;—as where a soldier, to disprove a charge of desertion, has to show that he has been detained in arrest by the civil authorities for some crime or disorder, or sentenced therefor by a civil court to a term of imprisonment; or the prosecution in a case of desertion has to prove such a sentence and confinement, as evidence of the existence of a "manifest impediment" excepting the case from the operation of the 103d Article of war;[1] or where an officer or soldier charged before a court-martial, in time of war, with one of the offences specified in Art. 58, has to offer in support of a plea of former trial, (under Art. 102,) the record of his acquittal or conviction by a civil tribunal having concurrent jurisdiction of the crime;[2] or where it may be material, (as in rare cases it has been,) to put in evidence a judgment of divorce, or a decree of a probate court granting letters of administration.

When thus required, the records of judgments, &c., of courts of the United States, (in the absence of the originals, which will rarely be attainable,) may be proved by copies under the seal of the court attested by the clerk. Judgments and judicial proceedings of State courts of general jurisdiction are proved by copies attested by the clerk and certified by the judge, as prescribed in Sec. 905, Rev. Sts.[3] Judgments, &c., of municipal courts, or courts of limited judicial authority such as those of justices of the peace, of whose proceedings a formal record is required by law to be kept, may be proved by copies authenticated, so far as may be practicable, in the manner prescribed by the same statute. In the absence of a formal record, such judgments, &c., are proved by the book containing the minutes, produced and verified by the justice or other proper custodian as a witness, or by a copy of the minutes authenticated according to the local law or usage, or, if there has been no minute or written entry made of the proceedings, by the testimony of the justice or other "competent person."[1]

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[1] See *In re* Davison, 4 Fed. Rep., 507.

[2] See Chapter XVI—"Plea of Former Trial."

[3] As to judgments of courts of *foreign* countries, these, says Marshall, C. J., in Church *v.* Hubbart, 2 Cranch, 238, are to be authenticated—"1. By an exemplification under the great seal; 2. By a copy proved to be a true copy," (by a witness who has compared it with the original. 1 Greenl. Ev. § 514;) "3. By the certificate of an offi-

These forms of proof, adopted in civil proceedings, should also be observed in military cases, unless the parties, by *stipulating* to admit the existence and substance of the record desired to be shown, may dispense with the usual formalities.

Records of military tribunals. These, not being possessed or held in the office of any court or by any *judicial* authority, but being simply preserved in the War Department, or at the headquarters of military commands, are, as respects the form of proving the same by authenticated copies, not judicial records but executive documents. They will therefore be included under the following head.

2. Other Public Documents. This second species of public writings consists, mainly, of the acts of the legislative and executive departments of government in their collective capacities, and of the official acts of the separate public functionaries, as contained in official books and papers forming the records of

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cer authorized by law, which certificate must itself be properly authenticated. These," he adds, "are the usual, and appear to be the most proper, if not the only, modes of verifying foreign judgments. If they be all beyond the reach of the party, other testimony inferior in its nature might be received." And see 1 Greenl. Ev. § 514; Butterick *v.* Allen, 8 Mass., 273; Lincoln *v.* Battelle, 6 Wend., 475. If a foreign judgment were proposed to be offered in evidence before a military court, it would be desirable to procure to be appended to the record a certificate of the American consul, attesting the genuineness of the signature of the certifying judge or clerk, and stating that the authentication was in the usual form adopted for copies of records of the particular court. The copy might then properly be admitted without further evidence. See Packard *v.* Hill, 7 Cow., 434.

[1] 1 Greenl. Ev. § 513.

public transactions. These may therefore be divided into: (1) Legislative acts and acts of State; such as Acts and Resolutions of Congress, and Congressional debates and proceedings; Executive proclamations, orders, communications to Congress, &c.; and Treaties; (2) Official books and papers.

1. Legislative acts and acts of State. The public Statutes—Acts and Resolutions[1]—of Congress are proved as follows: If enacted prior to December 1, 1873, they are proved by the Revised Statutes, which comprise a single Act of Congress of June 22, 1874, (originally published in one volume in 1875, and of which a Second Edition, that now in use, was published in 1878,) and constitute a revision and consolidation of all the existing public laws, (as contained in the previous seventeen volumes of "Statutes at Large,") in force on said December 1, 1873,[2] with a very few designated exceptions.[3] If enacted since December 1, 1873, public statutes are proved, either by the single volume designated as the "Supplement to the Revised Statutes,"[4] made, by the Joint Resolution of June 7, 1880, "*prima facie* evidence of the laws therein contained;" or by the separate publications or volumes issued from year to year under the direction of the Secretary of State,[5] according to the provisions of the Act of June

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[1] "Resolutions" are no less statutes than "Acts." Originally—in the Continental Congress—all enactments were designated as Resolutions. Under the Constitution, Resolutions were first resorted to mainly for the requesting, authorizing, or directing of things to be done by executive officials of the government, the regulation of minor details of public expenditure, &c. Later, they have not unfrequently contained legislation on subjects of general importance capable of being briefly disposed of. They are now designated in their titles as "Joint Resolutions," and in their publication are classed as "Public" and "Private" Resolutions; the latter, with the "Private Acts," comprising the legislation for the relief or benefit of individuals.

[2] The authority for the original revision of the statutes, and for the publication of the same, as also for the preparation and publication of a new edition, is contained in the Acts of June 27, 1866, June 20, 1874, and March 2, 1877. See Appendix to Revised Statutes, pp. 1089–1092. Compare Wright *v.* U. S., 15 Ct. Cl., 80.

[3] These exceptions—*i. e.* the enactments *not repealed* by the Revised Statutes—are specified in Sec. 5596, R. S.

[4] The "Supplement" (Second Edition) embraces statutes enacted between 1874 and 1891 inclusive.

[5] They are published in "pamphlet" volumes after each session of Congress, and subsequently in bound volumes of Statutes at Large.

20, 1874, and made by said Act "legal evidence of the laws and treaties therein contained."

Private statutes are proved by the printed copies of the Private Acts and Resolutions as first collected in Vol. 6 of the Statutes at Large, and further contained in each volume of those Statutes from the 9th to the volume last published.

The public treaties are proved from the Volume containing treaties in force, required to be compiled and published by sec. 3 of the Act of June 20, 1874; and, as to those of later date, by the printed copies of the same published at the end of the volumes of Statutes at Large from Vol. 18 to the last volume.

Publications of statutes in Orders. As already indicated, military courts may properly take judicial notice, without further evidence, (in the absence of proof that they are incorrectly printed,) of the Acts and Resolutions of Congress relating chiefly to the Army, which are published for its information in printed General Orders issued from the War Department or Headquarters of the Army.

A statute of Congress, not yet published, can only be proved by a copy from the State Department, (where the original is deposited,) authenticated under the seal of the department.

State or Territorial statutes are proved by the authorized publications of the same, or by copies authenticated under the seal of the State, &c., as prescribed in Sec. 905, Rev. Sts.[1]

The proceedings and debates of Congress are proved from the publication of the same, as printed by the Public Printer, (or other person with whom a contract for such printing may be

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These volumes, as succeeding the seventeen vols. published up to the date of the Revised Statutes, commence with Vol. 18. The last thus far, (1895,) is Vol. 28.

[1] See an instance of a State law, published in a pamphlet, held inadmissible in evidence because not properly authenticated—in Craig *v.* Brown, Peters, C. C., 352.

Foreign written laws are authenticated similarly to foreign judgments. (See note *ante.*) But foreign *unwritten* laws, customs and usages may be proved by parol evidence, *viz.*, by the testimony of competent persons instructed in or acquainted with the same. See 1 Greenl. Ev. § 488; Church *v.* Hubbart, 2 Cranch, 237.

authorized by Congress to be made,) according to the provisions of Sec. 78, Rev. Sts., and of the Act of January 22, 1874.[1] Similar proceedings of the Legislatures of the States or Territories are to be proved from the official journals or other authentic publications.

Executive Proclamations, and Orders of the nature of proclamations,[2] proceeding from the President, are usually published at the end of the volumes of the Statutes at Large, and may be proved therefrom, or from authenticated copies in the custody of the Secretary of State.[3] Executive messages and communications to Congress, (including those from Heads of Departments,) as well as other State papers ordered by it to be printed, are proved from the Journals and Public Documents published by the authority of Congress.[4]

Other Executive acts. *Pardons*, where the original charter cannot be produced, are shown by authenticated copies from the State Department. *Appointments*, in the absence of the original letter or commission, are proved by duly authenticated copy from the proper Department, or certificate of the fact as there recorded. The General Orders, however, issued from the War Department or through the Headquarters of the Army, are properly received by military courts as competent evidence of all proclamations or orders of the Executive, or other executive acts, which may be published therein.

Acts of the Executives of the States or Territories are to be proved from authorized publications, or by copies certified by the proper official, or, if matter of public record, in the form prescribed by Sec. 906, Rev. Sts.

2. Official Books and Papers of the U. S. Executive Departments. These, where material in evidence, are provable either by the *original*, produced and sworn to by the proper official custodian as a witness on the stand;[1] or, where—as is usually the case—the original is not accessible, by *copy*, as provided in Sec. 882, Rev. Sts., as follows:—"*Copies of any books, records, papers, or documents in any of the Executive Departments, authenticated under the seals of such Departments, respectively, shall be admitted in evidence equally with the originals thereof.*"[2]

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[1] The proceedings and debates of Congress are at present published in the "Congressional Record," an official publication printed by the Public Printer and issued daily during each session.

[2] See such "Executive Orders" in 13 Stat's. at Large, 775–778.

[3] Lapeyre *v.* U. S., 17 Wallace, 198–199; Street *v.* U. S., 24 Ct. Cl., 249–250.

[4] See Watkins *v.* Holman, 16 Peters, 26; Bryan *v.* Forsyth, 19 Howard, 334; Gregg *v.* Forsyth, 24 Id., 179.

As to the *form* of the authentication prescribed by the statute—this, as it is held by the authorities, must be "strictly pursued."[3] It has however been ruled by the Supreme Court that the *signature* of the Head of the Department is not necessary to complete the authentication, the presence of the *seal* alone being required to make the transcript evidence.[4] In the practice indeed of the War Department, the certificate of authentication has in general been attested by the signature of the Secretary of War. This certificate has commonly also been preceded by one signed by the chief of bureau, or other subordinate, who may have the immediate custody of the original, to the effect that the paper, &c., is a true copy of such original in his charge. Such preliminary certificate, however, though convenient as assuring the Secretary that the copy has been correctly made out, is quite immaterial to the legal proof required.

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[1] In Evanston *v.* Gunn, 99 U. S., 660, it was held that the original record made by a member of the U. S. Signal Corps, of the state of the weather and the direction and velocity of the wind on a certain day, was competent evidence of the facts reported, as being in the nature of an official record kept by a public officer in the discharge of public duty.

[2] See G. C. M. O. 20, Dept. of Arizona, 1893. It may be noticed here, as applicable generally under the present head, that, independently of statute and "on general principles of law, a copy given by a public officer, whose duty it is to keep the original, ought to be read in evidence." Marshall C. J., in U. S. *v.* Percheman, 7 Peters, 85.

It may also be remarked that where an official document (or public record) is *lost or destroyed*, its contents, after proof of the loss or destruction, may be proved by secondary evidence. See 1 Greenl. Ev. § 509.

[3] Smith *v.* U. S., 5 Peters, 302; U. S. *v.* Harrill, McAllister, 243; Pendleton *v.* U. S., 2 Brock., 75. In the last case, a copy of a letter from the War Department to an army contractor was held inadmissible in evidence because not authenticated as prescribed by statute. On the trial of Capt. John Shaw of the navy, a copy of a letter from the Secretary of the Navy to the prosecutor in the case was ruled out on the same ground. Printed Trial, p. 34. So, copies of files of the War Department not duly authenticated were held inadmissible on Gen. Dyer's Court of Inquiry, part I, p. 7.

[4] Smith *v.* U. S., 5 Peters, 300.

Copy not evidence where original necessary and producible. It may here be noted that where the actual execution of a paper by the signature of an officer or soldier is required to be shown, an authenticated copy will not be sufficient if the original exists and is attainable. As where, for example, the accused is charged with having signed a false certificate on a pay roll or other voucher; here the original, if not lost or destroyed and if producible, must be exhibited with proof of handwriting.[1] The procedure where such an original is in the possession of the adverse party has already been indicated in this Chapter.[2]

An original paper on file in an executive department or office is proved by the person in whose custody it is, appearing as a witness on the stand and producing and swearing to the paper as the original.

Publications authorized by statute. Where a document of one of the Departments has been printed and published by the authority of statute, each printed copy is an original and proves itself.[3] Such a document is the Army Register, and it has been held by the Supreme Court[4] that this compilation is evidence of such facts "as the names of officers, date of commissions, promotions, resignations, and regimental rank, brevet and other rank, or the department of the army to which officers belong." But it was further held that the Register could not be received as evidence of the pay or emoluments of officers, the organization of the army, or any other matter which was the subject of an express *statute* fixing and defining it. For, as it was declared, the statute itself is the best evidence of its provisions, and where these are material to the issue, the court itself must judicially expound them and not accept the construction of executive officials.[1]

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[1] G. C. M. O. 25 of 1875; G. O. 3, Dept. of the N. West, 1863; Do. 28, Dept. of the South, 1864. See "Lost or Destroyed Writing," *ante*, p. 488.

[2] See—"Paper in adverse possession—Notice to produce," *ante*, p. 489.

[3] 1 Greenl. Ev. § 90.

[4] Wetmore *v.* U. S., 10 Peters, 652.

General Orders, &c. The printed official copies of "General Orders" and "General Court-Martial Orders," and the "Circulars," published from the War Department or Headquarters of the Army, though not authorized by statute, carry upon their face such evidence of authenticity that they are always admitted as evidence before courts-martial, in lieu of formally authenticated written copies of the originals. In many cases indeed there are no preserved written originals; and in all cases military courts, as has heretofore been remarked, will take judicial notice of the printed forms as genuine and correct. As to the Special Orders emanating from the same sources, while these have a much more restricted scope as publications, they are equally formal and official, and the printed copies, in the absence of any indication that they are not genuine, may safely and properly be admitted in evidence by military courts in the same manner as General Orders.[2]

The printed General and Special Orders, issued from the Headquarters of Military Divisions and Departments, may properly be regarded as similarly proving themselves and admissible.

A printed General or Special Order, to be admitted as competent evidence, should, strictly, bear the written signature of the Adjutant General, or Assistant Adjutant General, or other staff officer, below the printed word "Official" at the end of the form. This however may be dispensed with in the absence of evidence that it is *not* an official copy.

Proceedings of military courts. As heretofore noticed, such proceedings are not judicial records but executive documents, and, as to the form and manner of their authentication and proof, are to be classed with the other official papers on file in the Departments. The 114th Article of war, entitling persons tried by general court-martial to be furnished with copies of the "proceedings and sentence of such court," does not do away with any of the forms required to render copies of official papers admissible in evidence; nor does Art. 121, in authorizing the proceedings of courts of inquiry to be used as evidence on trials before courts-martial, affect the matter of the form of authentication of copies as prescribed by Sec. 882, Rev. Sts. On military trials, however, the parties may stipulate to dispense with the full legal form. Thus, where the original cannot be produced, the copy furnished from the Bureau of Military Justice, with no other authentication than the endorsed attestation of the Judge Advocate General to the effect that the same is a "*true copy*," may be agreed to be admitted without further formality. So the parties may consent to admit any separate portion of the proceedings or testimony set forth in such copy that may be material. Where indeed the proceedings have been promulgated in a General Order, and some fact, fully appearing in such Order,—as the finding, acquittal, sentence, or action of the reviewing authority,—is alone desired to be proved, the parties may well stipulate to admit in evidence a copy of the printed Order, of the authenticity indeed of which the court will properly take judicial notice.

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[1] Wetmore *v.* U. S., *ante.*

[2] If a General or Special Order, required or material to be put in evidence on a military trial, has not been printed or published, and exists only in a written form, it is to be proved like any other official paper,—unless admitted by consent without proof.

Official papers of military commands. Such are the records of inferior courts,[1] books, official reports, communications and papers, kept on file at the Headquarters of military Divisions and Departments, as also the various Regimental, Company, Post and Hospital books, &c., recognized by army regulations or military usage. These are not public records in the sense of Sec. 882, Rev. Sts., and the special provision of that section in regard to proof by authenticated copy can hardly be regarded as extending to them. Proof of the same therefore will, strictly, be made by the *original*, produced and identified by the proper custodian appearing on the stand as a witness. On military trials, however, *copies* of such papers, &c., or of the material entries in such books, attested by the proper commander or staff officer, will in general properly be admitted, by the consent of the parties and acquiescence of the court, as competent evidence of their contents, and as such evidence be annexed to or incorporated in the record of the trial.

Where however a paper or book of this class, or indeed *any* official paper, sets forth acts done, &c., by an officer or soldier signing the same or referred to therein, and such acts, &c., are material evidence, and can be proved by the officer or soldier himself in person as a witness, his testimony, as being the "best evidence" of the facts, should be resorted to instead of the writing.[1] So, where it is proposed to put in evidence on a trial certain facts already deposed to by witnesses before a court-martial, board of survey, &c., the witnesses themselves must, if practicable, be introduced to testify anew before the court; the record of the original court, board, &c., being secondary evidence and not admissible if the personal testimony can be obtained.[2]

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[1] Now required, by Act of March 3, 1877, to be retained and filed in the Judge Advocate's Office at Department Headquarters.

Official documents and papers of State and Territorial governments. These, if matter of public record, may be proved by copy authenticated as specified in Sec. 906, Rev. Sts.; if not, in such manner and form as may be prescribed by the law, or sanctioned by the judicial usage, of the State or Territory.

Legal effect, as evidence, of Public Writings. Judicial records, or copies of the same when duly authenticated, are said to import "absolute verity," so that a presumption as nearly as possible conclusive is recognized as arising in favor of their correctness. Acts of State, when authoritatively promulgated, may be said to prove themselves with a conclusiveness parallel to that of judicial acts. Not much less cogent is the presumption which is recognized in favor of public books and records, other than judicial, required by statute to be officially kept. As to other official papers, these furnish not conclusive but *prima facie* evidence only of the facts therein stated,[3]—evidence which is more or less strong in proportion to the formality, public consequence, and legal sanction attaching to the writing, but is always subject to be rebutted.

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[1] See this point noticed in G. O. 28, Dept. of the South, 1864; Do. 51, Middle Dept., 1865; Do. 32, Dept. of the East, 1869.

[2] G. O. 39, Dept. of the Susquehanna, 1864. By an express provision, however, of Art. 121, the proceedings of a *court of inquiry* may be admitted in evidence upon a trial by court-martial in certain cases. So, the rule as stated in the text may be departed from by consent of parties, with the acquiescence of the court; indeed the testimony of a witness, (who has been subjected to cross-examination,) on a previous trial and investigation, may sometimes constitute not only the most convenient but the most desirable form of presenting the facts in evidence.

[3] Parish *v.* U. S., 2 Ct. Cl., 341; Hart *v.* U. S., 15 Id., 414; Chapman Township *v.* Herrold, 58 Pa. St., 106.

But such papers, whether originals or authenticated copies, are evidence only as to matter of their contents; however formal and authoritative *per se*, they prove or import nothing beyond themselves. Thus it has been held that the mere production in evidence of a formal written order or notice from the War Department, addressed to an officer, did not afford any legal inference that it was received by him or even mailed to his proper station.[1] The point is illustrated by the entries of *charges* against soldiers in the report books, muster-rolls, &c., of companies: though these entries are formal acts, they import only that the *charges* have been made, furnishing no evidence whatever as to the commission of the *offences*.[2]

So, an official certificate is evidence only of facts therein stated which the officer was *authorized* to certify.[3] And of all official statements, as well as of public records, it is to be remarked *generally* that if they contain matter not within the province or official cognizance of the subscribing officer, they are, as to such matter, *extra-official* and not admissible as evidence.[4]

Restriction on the use in evidence of official documents and papers. As has already been noticed, the documents and papers of the Executive departments and officers of the Government are not in general public records open to inspection by any citizen, but confidential archives in the legal custody of the Head of the Department. And it has uniformly been held that this official may decline to allow copies of such papers to be made or authenticated for use in evidence before the courts, when, in his opinion, considerations of public policy or justice render it inexpedient that their contents should be made public.[1] This course, (subject to the provisions of Arts. 114 and 121,) may be pursued with military charges, or records of military investigations, equally as with other official communications and documents.[2] So, as to official reports and communications addressed to him, or other confidential papers on file at his Headquarters, a Commander of a military Division or Department is properly to be regarded as invested with an authority analogous to that of the Head of the Executive Department whom he represents.[3] The corresponding officials of a State or Territory possess a discretion in this respect similar to that ascribed to the superior federal officers indicated.

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[1] G. C. M. O. 25 of 1875.

[2] G. O. 33, Dept. of the Mo., 1875; G. C. M. O. 14, Dept. of Texas, 1876; Do. 22, Dept. of the East, 1882. So, in Hanson *v.* S. Scituate, 115 Mass., 336, an authenticated copy of an extract from a muster-roll on file in the War Department, in which it was stated that a soldier had deserted, was held not to constitute legal evidence of such desertion, such statement being in fact a *charge* only.

[3] Levy *v.* Burley, 2 Sumner, 358, (Story, J.) And see Owings *v.* Hull, 9 Peters, 624–6; U. S. *v.* Wiggins, 14 Id., 346; U. S. *v.* Delespine, 15 Id., 226; White *v.* Burnley, 20 Howard, 235.

[4] See 1 Greenl. Ev. § 491; U. S. *v.* Jones, 8 Peters, 375, 388; Wetmore *v.* U. S., 10 Id., 652.

II. PRIVATE WRITINGS.

As Testimony in Military Cases. The term "Private Writings," as employed in the works on Evidence, has especial reference to contracts, deeds, and other personal written instruments and obligations. In the military practice, writings of this character are not often required to be put in evidence on trials. It may sometimes indeed be necessary or material to introduce such writings as contracts of enlistment, contracts between officers representing the government and civil contractors, or official bonds of disbursing officers; but these in general will have become part of the official papers of the War or other Executive Department, and so provable by the original or a copy procured therefrom in the manner and form already indicated under the foregoing Title. Upon a charge also of unbecoming conduct in the dishonorable non-payment of a debt, it may be found material to prove the execution of a promissory note, check, or bill of exchange. More commonly, however, the class of private writings which come to be the basis of military charges or are required to be put in evidence on military trials are communications or statements written or caused to be written by the authors, (or published in newspapers or pamphlets,) containing false charges or disrespectful language, or which are otherwise unauthorized or improper and prejudicial to military discipline. With these may be enumerated, as special instances, written challenges sent or accepted in violation of Art. 26, communications made to an enemy in violation of Art. 46, letters or telegrams sent by offenders or interested persons and illustrating their *intent*, &c.

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[1] 1 Greenl. Ev. § 250, 251, 476; Wharton, Cr. Ev. § 513; Clode, M. L., 147–8; and authorities cited in note under the head of "Evidence excluded from considerations of public policy," p. 499, *ante*.

[2] See Home *v*. Ld. Bentinck, 5 Brod. & Bing., 130; Dawkins *v*. Ld. Paulet, 5 Q. B., 94; Dawkins *v*. Ld. Rokeby, 8 Id., 255; Dickson *v*. Earl of Wilton, 1 Fost. & Fin., 419. But see 11 Opins. At. Gen., 137.

[3] See G. O. 25, Dept. of the Mo., 1867.

The general rules already set forth as to the introduction and admission of evidence apply to writings of this class in common with other proofs; and it will be necessary to consider here but two points, as follows:—

Proof of Genuineness and Identity. The writing proposed to be proved must be produced in court and identified by the proper witness or witnesses as having been actually sent,[1] received, written, published, &c.[2] If it is a writing specifically referred to in the charges, the paper produced must appear to correspond in terms or substance with that thus set forth or described.[3] If it be indefinite, obscure, or incomplete *per se*, it may be explained, elucidated, or completed by other testimony. So, where expressed in a foreign language; it may be translated by a competent witness. But where it consists of a deliberate formal instrument, as an express contract, it cannot be varied or contradicted by parol evidence.[4]

If the writing produced is a *copy*, it must be shown to be a true transcript by one who has compared it with the original, and the original must be shown to have been genuine and to be lost or destroyed.[5] Where the fact to be proved is the mere receipt of a *telegram*, the copy identified as that actually received may ordinarily be admitted in evidence on a military trial; but if necessary that the original should be proved in order to show that a certain form of words was actually sent, or that the message as sent was different from the copy received, or was signed by or in the handwriting of the accused or other person, the operator or other proper official must be summoned and required to produce such original, (which is not a privileged communication,) and the same must be clearly identified by his or other testimony.[1]

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[1] A postmark on a letter is presumptive evidence that it has been mailed. U. S. *v.* Noelke, 17 Blatchford, 555.

[2] See Stroud *v.* Springfield, 28 Texas, 649; Renn *v.* Sands, 33 Texas, 760.

[3] G. C. M. O. 64, Dept. of the Mo., 1881.

[4] 1 Greenl. Ev. § 275; Hunt *v.* Rousmanier, 8 Wheaton, 211; Emerson *v.* Slater, 22 Howard, 41; Findley *v.* Bk. of U. S., 2 McLean, 57; Kemble *v.* Lull, 3 Id., 272.

[5] McGinnis *v.* Sawyer, 63 Pa. St., 259; Krise *v.* Neason, 66 Id., 253; Sternburg *v.* Callanan, 14 Iowa, 251. A copy of a copy is not admissible. Maurice *v.* Worden, 54 Md., 233.

Proof of Handwriting. Where it is necessary to prove that a writing proposed to be put in evidence was written or signed by the accused or other person, and this cannot be shown by the party who wrote or signed it, (as where he was the accused himself,) or by a subscribing witness, (the paper not having been formally witnessed, or the witness being dead or not attainable,[2]) the same is properly established either—(1) by the testimony of witnesses having personal knowledge of the handwriting;[3] or (2) by a comparison of writings, made—in a military case—by the court.

1. By witnesses having knowledge.[4] Such knowledge, it is held, must have been acquired in one of two ways. The witness must (1) either have seen the individual write,[5]—and it is not essential that he should be familiar with his writing, for his evidence is admissible, for what it is worth, if he has seen the party write but once and then only his name;[1] or (2) he must have seen letters or other writings purporting to be in his handwriting and have been in some manner satisfied that they were written by him,—as by having corresponded with him on the basis of them, or having taken action upon them which he has acquiesced in, or by the fact, known to the witness, of the person himself having otherwise adopted and acted upon such writings in business or official transactions, &c., as his own.[2]

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[1] See Wharton, Law of Ev. § 76, 1128; Id., Cr. Ev. § 645; Woods *v.* Miller, 55 Iowa, 168.

[2] If there is a subscribing witness to the paper, he must be called if he can be reached and is legally competent. Kinney *v.* Flynn, 2 R. I., 319; 1 Greenl. Ev. § 569.

[3] "In regard to the term 'handwriting,' we think that it should include, generally, whatever the party has written with his hand, and not merely his common and usual style of chirography." Shaw, C. J., in Com. *v.* Webster, 5 Cush., 301.

[4] In Goodhue *v.* Bartlett, 5 McLean, 186, it was held, (following Moody *v.* Rowell, 17 Pick, 490,) that it was sufficient for the witness to swear affirmatively as to the handwriting, without stating how he knew it to be that of the party, leaving it to the other side, on cross-examination, to question as to the sources of his knowledge. In practice, however, the witness is generally called upon to state the grounds of his knowledge on the direct examination.

[5] Hopkins *v.* Simmons, 1 Cranch, C., 250; U. S. *v.* Larned, 4 Id., 312; Hopkins *v.* Megguire, 35 Maine, 78; Lyon *v.* Lyman, 9 Conn., 55; Keith *v.* Lothrop, 10 Cush., 453; Bingham *v.* Peters, 1 Gray, 145; People *v.* Spooner, 1 Denio, 343; State *v.* Allen, 1 Hawks, 8. "To identify handwriting, the oath of the writer, or his admission if produced against him, is the best evidence; then the testimony of persons who saw the writing actually written, or of persons who, from a knowledge of the writer, and from having seen him write, are ac-

This, as has already been noticed, is one of the few exceptional cases in which a witness may be permitted to declare his opinion or belief. And in arriving at the opinion that the writing or signature in question is or not that of the accused, or other alleged person, "the test of genuineness," as is observed by the court in an English case,[3] "ought to be the resemblance, not to the formation of the letters in some other specimen or specimens, but the general character of writing which is impressed on it as

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quainted with his handwriting." Simmons § 1041. But where the knowledge of the handwriting had been obtained by the witness from seeing the party write his name, "for the purpose of showing to the witness his true manner of writing it," and after the commencement of the suit, the evidence was held inadmissible. Stranger *v.* Searle, 1 Esp., 15. In George *v.* Surrey, 1 M. & Malk., 516, it was held that the genuineness of a person's *mark* might be testified to by a witness who had seen him make it on several occasions.

[1] 1 Greenl. Ev. § 577; 2 Bishop, C. P. § 432 *a;* Bowman *v.* Sanborn, 5 Foster, 110; Fulton *v.* Hood, 34 Penn., 371; Cross *v.* People, 47 Ills., 153; Simmons § 1041.

[2] Doe *v.* Suckermore, 5 Ad. & El., 705; Hammond's Case, 2 Greenl. R., 35; Page *v.* Homans, 2 Shep., 478; Withee *v.* Rowe, 45 Maine, 580; Bowman *v.* Sanborn, 5 Foster, 110; Moody *v.* Rowell, 17 Pick., 494; Com. *v.* Webster, 5 Cush., 295; Brigham *v.* Peters, 1 Gray, 145; Kinney *v.* Flynn, 2 R. I., 319; Lyon *v.* Lyman, 9 Conn., 59; Titford *v.* Knott, 2 Johns. Cas., 211; Johnson *v.* Daverne, 19 Johns., 134; People *v.* Spooner, 1 Denio, 344; Travis *v.* Brown, 43 Pa. St., 9; Pope *v.* Askew, 1 Ire., 20; McKonkey *v.* Gaylord, 1 Jones L., 96; State *v.* Allen, Hawks, 8; So. Ex. Co. *v.* Thornton, 41 Miss., 216; 1 Greenl. Ev. § 577; 2 Bishop, C. P. § 432 *a*; Wharton, Cr. Ev. § 552. It is not essential that the witness should have ever seen the party write or have corresponded with him. Rogers *v.* Ritler, 12 Wallace, 317. "The value to be given to the opinion of a witness as to the authorship of handwriting is to be determined by the opportunity and circumstances under which he has acquired his knowledge." U. S. *v.* Gleason, 37 Fed., 331.

[3] Coleridge, J., in Doe *v.* Suckermore, *ante.*

the involuntary and unconscious result of constitution, habit, or other permanent cause, and is therefore itself permanent."

2. By comparison—with other writings in evidence. The evidence last indicated is, indeed, "in its nature, comparison," the belief of the witness being derived from "comparing the writing in question with its exemplar in his mind derived from some previous knowledge."[1] The *comparison* now to be considered, however, is that which is technically known as such, *viz.* comparison by written "standards." By the weight of authority in this country, and until recently in England, proof of handwriting by such comparison has not been sanctioned *except* where there were already in the case, as evidence for some other purpose, other writings, proved or admitted to be genuine, of the individual whose handwriting is in question. In such a case the genuineness of the particular writing or signature in dispute has been allowed to be determined or tested by a comparison of the same with such other writings as standards.[2] Such comparison, made by the jury in civil cases, would in military cases of course be made by the court. To assist in the comparison, and in the determining of the question of genuineness, the evidence of experts, *pro* and *contra*, may—it is held—be introduced by the parties.[3] The expert,—who need have had no previous knowledge of the person's handwriting,[1]—may express his opinion upon such points as whether the signature is genuine or simulated,[2] whether the writing of the paper is in a real or feigned hand,[3] whether the signature and the body of the paper were written by the same person, whether the whole of the paper was written by the same individual and at the same time,[4] whether a date or amount has been altered by the substitution of one figure for another,[5] &c.; and he may state in full his reasons for his conclusions.[6]

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[1] 1 Greenl. Ev. § 577; Travis *v.* Brown, 43 Pa. St., 9; Stokes *v.* U. S., 157 U. S., 191, 194, and cases cited.

[2] Moore *v.* U. S., 91 U. S., 270; U. S. *v.* Chamberlain, 12 Blatchford, 390; Medway *v.* U. S., 6 Ct. Cl., 421; also 1 Greenl. Ev. § 578; Wharton, Cr. Ev. § 556; 2 Bishop, C. P. § 432 *b*, and cases cited.

[3] 1 Greenl. Ev. § 578; Wharton, Cr. Ev. § 559, 560; 2 Bishop, C. P. § 432 *c*, and cases cited. The experts usually resorted to appear to have been cashiers, tellers, or clerks of banks; (see Moody *v.* Rowell, 17 Pick., 490; Lyon *v.* Lyman, 9 Conn., 59;) or persons employed by banks or public offices to detect forgeries; (see Goodtitle *v.* Braham, 4 Term, 497; Cooper *v.* Bockett, 4 Moore P. C., Cas., 433; Doe *v.* Suckermore, 5 Ad. & El., 703; People *v.* Spooner, 1 Denio, 344; Lodge *v.* Phipher, 11 Sergt. & Rawle, 336.) In Goodtitle *v.* Braham, and King *v.* Cator, 4 Esp., 117, the expert was an inspector or clerk of the Post Office accustomed to inspect franks for the detection of forgeries. In Cooper *v.* Bockett, the expert had "been in the habit of examining and comparing writings, and so employed by the Bank of England for eleven years and upwards." In Moody *v.* Rowell the expert had been a writing teacher "for more than forty years." Doe *v.* Suckermore, a "writing-engraver" was used as an expert. In the case of Cadet Whittaker, *post*, most of the witnesses introduced (on both sides) to assist in the comparison were so-called "professional experts in handwriting."

It appears, however, to be the sentiment of the authorities that the testimony of experts as to handwriting is not in general of a very satisfactory character. "No great reliance," says Bishop, "should be placed on their evidence."[7] It is after all only *opinion*, and as such to be received with caution.[8] Such as it is, however, it is allowed to go to the jury, (or, in military cases, to be considered by the court,) for whatever it may be worth.

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[1] King *v.* Cator, 4 Esp., 144; Nelson *v.* Johnson, 18 Ind., 329.

[2] See King *v.* Cator, *ante;* Withee *v.* Rowe, 45 Maine, 519; People *v.* Spooner, 1 Denio, 343.

[3] Lyon *v.* Lyman, 9 Conn., 55. In Keith *v.* Lothrop, 10 Cush., 455, the expert, on comparing the writing in dispute with "acknowledged or proved specimens" of the handwriting of the party, gave it as his opinion, that the handwriting of the former was not genuine but artificial—"that it was a simulated, stiff, and imitative hand, and not a free and natural one." And see Moody *v.* Rowell, 17 Pick., 495. In Com. *v.* Webster, 5 Cush., 295, it was decided that—"On a criminal trial an expert in handwriting may testify whether, in his opinion, anonymous letters written in a disguised hand, and calculated to divert suspicion from the defendant, are in the defendant's handwriting."

[4] Fulton *v.* Hood, 34 Pa. St., 370. And see Goodtitle *v.* Braham, 4 Term, 497; U. S. *v.* Darnaud, 3 Wallace Jr., 183; Wharton, Cr. Ev. § 559. In Cooper *v.* Bockett, 4 Moore P. C. Cas., 433, it was ruled that where one writing crossed another, an expert might testify which, in his opinion, was the first written.

[5] Nelson *v.* Johnson, 18 Ind., 329.

[6] Keith *v.* Lothrop, 10 Cush., 455; Com. *v.* Webster, 5 Id., 295; 2 Bishop, C. P. § 432 *c.*

[7] 2 C. P. § 432 *c.* And see Wharton, Cr. Ev. § 9, 420; Doe *v.* Suckermore, 5 Ad. & El., 751; The Tracy Peerage, 10 Cl. & Fin., 154; People *v.* Spooner, 1 Denio, 343; Borland *v.* Walrath, 33 Iowa, 130; Cowan *v.* Beall, 1 McArthur, 274. On the trial of Cadet Whittaker, (*post,*) much of the elaborate *expert* testimony, though illustrated by magnified representations and photographic impressions, was fanciful, unsubstantial, and of slight value. As to the unsatisfactory character of such testimony, compare Borland *v.* Walrath, 33 Iowa, 130; Whitaker *v.* Parker, 42 Id., 585.

[8] U. S. *v.* Pendergast 32 Fed., 198. And see U. S. *v.* Molloy, 31 Fed., 19.

With any genuine writings. The above exception to the common-law rule as to proof of handwriting by comparison has recently been extended in England by a statute of 1865,[1] by which the comparison is now allowed to be made with any other writings whatever, although not in the case and in fact quite irrelevant and inadmissible in evidence therein for any other purpose, *provided* they are first admitted, or shown to the satisfaction of the court, to be *genuine* writings or signatures of the person whose handwriting is in question.[2] Similar statutes have been enacted in a considerable number of our States; as in New York,[3] Rhode Island,[4] Maryland,[5] Kentucky,[6] Tennessee,[7] Georgia,[8] Iowa,[9] California,[10] Oregon,[11] Nebraska,[12] Montana.[13] And the law—in the absence of any statutory provision—has been similarly held by the courts in sundry of the other States; —as in Massachusetts,[14] Maine,[15] New Hampshire,[16] Vermont,[17]

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[1] "Lord Denman's Act"—28 Vict., c. 18, s. 8. In the Manual of Military Law, p. 88, the rule established by this statute is applied to the procedure of courts-martial, and stated as follows—"With respect to handwriting it has been specially provided by statute that comparison of a disputed handwriting with any writing proved to the satisfaction of the court to be genuine, is permitted to be made by witnesses. * * * The comparison may be made either by a person acquainted with the handwriting, or by an expert in handwriting, or by the court itself."

[2] See Cobbett *v.* Kilminster, 4 Fost. & Fin., 490; Taylor on Ev., 1587; Wharton, Cr. Ev. § 555, note; 2 Bishop, C. P. § 432 *b*.

[3] Laws, 1880, c. 36.

[4] Pub. Stats., p. 588 § 42.

[5] Pub. Gen. Laws, vol. 1, p. 689.

[6] Gen. Stats., p. 548.

[7] Act, Feb. 26, 1889, c. 22.

[8] Code § 3840.

[9] Code § 4905.

[10] Code, Civil Procedure § 1944.

[11] Hill's Annotated Laws § 765.

[12] Compiled Stats., p. 783.

[13] Code, Civil Procedure § 2072.

[14] Moody *v.* Rowell, 17 Pick., 490.

[15] Chandler *v.* Le Barron, 45 Maine, 534.

[16] State *v.* Hastings, 53 N. H., 452.

[17] Adams *v.* Field, 21 Vt., 256; State *v.* Ward, 39 Id., 226; Rowell *v.* Fuller, 59 Id., 688.

Connecticut,[1] Ohio,[2] Pennsylvania,[3] Indiana,[4] South Carolina,[5] Mississippi,[6] Minnesota,[7] Kansas,[8] and in Utah.[9]

The common-law rule, however, denies the admission of such writings, and this rule has been recognized in the decisions of the U. S. Supreme Court,[10] and favored in other of the federal courts.[11] In the leading military case of Cadet Whittaker,[12] tried by general court-martial at West Point, New York, in 1881, the court, against the objection of the accused, admitted writings of his, not previously in the case but testified to be genuine, as standards of comparison with a disputed writing which was the basis of one of the charges. In an opinion of March 17, 1882,[13] this ruling was held by Atty. Gen. Brewster to be erroneous, as being opposed to the common-law doctrine, and the sentence advised to be "set aside."[14] This opinion having been concurred in by the President,[15] the proceedings and sentence were disapproved accordingly, on the ground of this objection alone, and one of the most extended and laborious investigations by court-martial ever held in this country thus came to naught. There were, however, special circumstances in this case which doubtless availed to induce the authorities to give to the accused, (a colored person,) the full benefit of any question as to the application of the law to his defence.

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[1] Lyon *v.* Lyman, 9 Conn., 55.

[2] Calkins *v.* State, 14 Ohio St., 222; Bragg *v.* Colwell, 19 Id., 407; Bell *v.* Brewster, 44 Id., 690.

[3] Travis *v.* Brown, 43 Pa. St., 9.

[4] Chance *v.* R. R. Co., 32 Ind., 472.

[5] Robertson *v.* Millar, 1 McMull, 120.

[6] Wilson *v.* Beauchamp, 50 Miss., 24.

[7] Morrison *v.* Potter, 35 Minn., 425.

[8] Macomber *v.* Scott, 10 Kans., 335; State *v.* Zimmerman, 47 Id., 247.

[9] Tucker *v.* Kellogg, 28 P., 870.

And see further, in this connection, 2 Bishop, C. P. § 432 *b;* Wharton, Cr. Ev. § 557.

[10] Moore *v.* U. S., 91 U. S., 270; Williams *v.* Conger, 125 U. S., 397.

[11] See U. S. *v.* Craig, 4 Wash., 729; U. S. *v.* Chamberlain, 12 Blatch., 390; U. S. *v.* Jones, 10 Fed., 469; Medway *v.* U. S., 6 Ct. Cl., 429. In U. S. *v.* Craig, however, the court, though recognizing the common-law rule, adds that it "never was well satisfied with the reason" of the same.

[12] The proceedings are published in G. C. M. O. 18, (H. A.,) of March 12, 1882. And see Do. 31, Dept. of Texas, 1892; Do. 37, Dept. of the Platte, 1892.

[13] 17 Opins. At. Gen., 300.

[14] An incorrect term as applied to action in a military case. *Disapproved* would have been the proper one, and is that used in the Order.

[15] See G. C. M. O. 18 of 1882, above noted.

In the opinion of the author the common-law rule on this subject is not a satisfactory one. The main objections which have been urged to using, as standards of comparison, writings not already in the case as evidence are, that there is danger that the same may be deliberately selected from the mass of the correspondence, &c., of the party as the specimens most favorable for the purpose, and may not therefore fairly represent his average handwriting; and further that their introduction may open the door to collateral issues. The modern tendency, however, is—as has been seen—to reject the earlier rule as rigid and opposed to sound reason, and to admit any "standards" clearly proved to be genuine writings of the party. Otherwise, it would appear, there must sometimes be danger of a failure of justice.

A court-martial composed of educated and intelligent officers of the army, representing the functions of both jury and judge, may, it is believed, safely be trusted, *where other sufficient means are wanting*, to depart from the strict common-law rule and avail itself, in its discretion, of the method authorized by the modern and enlightened English statute and sanctioned by the laws and rulings in not a few of our States. In view of the diversity of authority on the subject, such a court, in allowing itself to be so assisted, cannot—it is submitted—properly be viewed as taking "illegal"[1] action, when the course pursued will apparently work no injustice while conducing to a more complete investigation of the truth.[2]

Conclusion. In concluding, (as in beginning,) this Chapter, it may be stated, as the view of the author, that while a military court should, in general, as the wisest, safest and fairest proceeding, observe the well-established rules of evidence, yet where the rule pertaining to a particular subject is unsettled, or where it is so technical or antiquated as to restrict or embarrass a thorough investigation, the court may and should, in its discretion, adopt such course in regard to the reception and employment of testimony as justice—justice to the United States as well as to the accused—may appear to dictate.

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[1] The Attorney General, in his opinion, refers to the conviction in Whittaker's Case as "illegally obtained." The term is not a correct one, since the error of the Court, if it *was* an error, while it might properly have induced a *disapproval* of the proceedings and sentence, was not such as to have affected their *legal validity*.

[2] The view of the author, in regard to the proof of handwriting by comparison, is concurred in by Gen. Merritt in a recent General Order —G. C. M. O. 30, Dept. of Dakota, 1894.

CHAPTER XIX.

THE FINDING.

THE Trial having been completed, and the arguments or statements, if any are made, being concluded, the court proceeds—in general without any adjournment if the legal hours of session have not elapsed—at once to its Judgment, which consists of the Finding and Sentence.[1] If indeed the case is one in which considerable evidence has been taken and the judge advocate has not been enabled to bring up his record, the court may in its discretion adjourn to afford him time for the purpose. So in any case of importance, it may properly take an adjournment before entering upon the responsible duty of the Finding.

The subject of the Finding will be considered under the heads of—I. Mode and Rules of Procedure; II. Forms of Findings; III. Additions to the Finding.

I. MODE AND RULES OF PROCEDURE.

Clearing The presiding officer forthwith announces that the court will be cleared for deliberation upon its findings; whereupon accused, counsel, clerks, reporters, guards, witnesses, spectators, &c., and now also the judge advocate, (as required by the Act of July 27, 1892,) withdraw; and the doors are then closed.

Deliberation. Before voting, the court, if deemed desirable, may have the entire evidence read over to it by a member from the record. Commonly, however, it is found sufficient to refer to the different portions of the testimony from time to time, as the members may desire to refresh their recollection as to particular facts.

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[1] If, after the evidence, or the evidence of the prosecution, is all in, the accused escapes from military custody and absconds, the court may proceed to judgment in the usual manner notwithstanding. See Trial by Military Commission of H. H. Dodd, Indiana, 1864; and compare Fight *v.* State, 7 Ohio, 180; McCorkle *v.* State, 14 Ind., 39; State *v.* Wamire, 16 Id., 357.

Prior to the voting, discussion as to the merits of the case is sometimes engaged in by the members; but as such discussion, at this point, may perhaps exert an undesirable influence upon the views of the junior members, it is in general the preferable course, in order that all opinions may be as independent as possible, to reserve debate till the taking of a *vote* shall disclose differences necessary to be harmonized before a legal finding can be arrived at.[1]

When discussion is had, it may be informal, but should be free, frank and open.[2] Here, as in all other deliberations of the court, the principle of the perfect equality of the members should be observed, and a junior officer in rank or age be conceded the same right to declare his views as a senior.[3] So, whatever opinions or views are expressed should be expressed to all—laid before the court. As is remarked by Bishop[4] with regard to jurors —"If they do not spontaneously agree, they should confer together, each speaking in the hearing of all, not in clusters of two or three privately. Each should give due weight to the opinions of the others, but not concur in that to which he cannot bring his own judgment to consent."

Adjournment Pending Deliberation. In case of a pointed difference of opinion—as where, there being an even number of members, the vote upon a charge or specification is found to be a tie—a more extended deliberation may be considered desirable, and in such a case the court may adjourn and separate, to allow an interval for rest and reflection, or to enable the judge advocate or members to consult legal authorities or military precedents. Upon such an adjournment the members should not of course allow themselves to converse with or receive communications from other officers or persons in reference to the case under investigation. Making a personal communication to a *juryman* "is an indictable offence when such communication touches the subject matter of the trial, or it may be treated as a contempt of court."[1] So, "it is a misdemeanor in a juryman knowingly to permit such communications."[2]

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[1] See McNaghten, 115, and *post* under "Provision of Art. 95."

[2] See Tytler, 311; Kennedy, 182; Macomb, 58; De Hart, 174.

[3] "In all deliberations the law secures the equality of members." Par. 1005, A. R.

[4] 1 C. P. § 998 *a*.

Recalling Witnesses. It is held by Simmons[3] that the court, during its final deliberation, may, to assist its conclusions, "recall a witness for the purpose of putting any particular question deemed essential." He adds—"The parties must necessarily be present, and cannot be refused permission to cross-examine or re-examine the witness to the extent of the question proposed by the court. The prisoner moreover must have the fullest opportunity of meeting the evidence." This view is repeated by some subsequent writers.[4] Such course, however, has been most rarely pursued, and is now quite unknown, in our practice, and would, if resorted to, be regarded as an exceptional irregularity. It need hardly be remarked that the material evidence in the case should, properly, be so fully and clearly set forth in the record of that part of the trial in which it was introduced as to render such a proceeding quite unnecessary.

The Voting. This may be *viva voce*, but is commonly and preferably conducted by written, unsigned ballots. The votes—usually collected by the judge advocate—are taken, first upon the specification and then upon the charge, or, when there are several specifications, upon the same in order beginning with the first, and lastly upon the charge. Where there are several charges, the same proceeding is had as to each of the charges and its specification or specifications, separately, in the order of their number.

The Finding to be Complete. In military law a *general verdict*, (on all the charges, &c., together,) cannot properly be rendered; there must be, in fact and of record, a separate and independent formal finding upon each specification and each charge.[5] And where exceptions and substitutions are made,[6] the accused must be acquitted or convicted on every part—every averment and particular—of each specification and charge.[1] "The verdict," says Bishop,[2] "should be a complete finding in due form upon the whole issue and all the issues." Such a finding indeed is necessary not only to perfect the judgment, but to protect the accused against a second trial for any of the offences set forth in the pleadings.

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[1] Wharton, C. P. & P. § 729. And see 1 Bishop, C. P. § 996.

[2] Wharton, C. P. & P. § 721.

[3] Courts-Martial § 613.

[4] O'Brien, 264; De Hart, 174.

[5] Simmons § 620; Kennedy, 185.

[6] See *post*—"Partial Findings."

Where the charge is a *joint* one, there must similarly be separate and distinct votings and findings as to each of the joint accused.

Provision of Art. 95. It is provided by the 95th Article of war that—"*Members of a court-martial, in giving their votes, shall begin with the youngest in commission.*" Accordingly the judge advocate, in taking a vote, calls first upon the junior member, then upon the next senior, and so on to the president. This provision—one of the oldest in our military law[3]—was enacted no doubt upon the theory that the voting would be *viva voce* and open, and the reason which has been assigned for it is that the junior members, if required to vote first, will be less liable to be influenced by the opinions of their seniors. Where however the voting, as it more usually is at this stage, is by written ballot, the reason of the statute scarcely applies: it is rather as to the voting upon interlocutory questions that the rule is important to be observed.

Every Member Must Vote. All the members must join in the finding upon every charge and specification. A failure to vote would be a neglect of the duty impliedly enjoined by the order detailing the member upon the court, and also a violation in substance of his oath in which he swore "well and truly to try and determine;" and would thus constitute a military offence within the description of Art. 62.[4]

The Finding Must be According to the Evidence. The votes of the members must be based upon and governed by the *testimony* in the case considered in connection with the *plea*.[1] The member swears to "well and truly try and determine *according to the evidence*," and if he allows his vote to be controlled by facts known to himself or communicated to him by another member, but not in evidence,[2] or by his personal notions, prejudices or feelings, he is chargeable with a dereliction of duty. He should also take into consideration *all* the testimony, for he is not at liberty to disregard the statements of any witness not seriously impeached or shown to have perjured himself.[3] And, in so doing, he may measure the relative weight and credibility of the witnesses not only by the substance and quality of their evidence but by their appearance and manner on the stand under the direct and the cross-examination.[4]

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[1] That the findings must "*exhaust*" the specifications and charges, see McNaghten, 195; O'Brien, 264; De Hart, 180.

[2] 1 C. P. § 1004.

[3] It appears in the Code of Articles of James II, (1688.)

[4] Clode, M. L., 150. Further, the *accused* is *entitled* to have each member vote. Griffiths, 167–8.

While all matter of legal *excuse* will justly affect the findings, it is quite otherwise with matter of *extenuation*.[5] Such matter can legitimately be considered only in connection with the *sentence*, (where the punishment is discretionary,) or as a basis for a recommendation to clemency; or more properly by the reviewing authority in taking action upon the proceedings.

The court cannot in general properly base its finding, in the absence of testimony, upon admissions of the accused in his statement; the same not being evidence.[6]

Chance or Compromise Verdict. The voting must consist in an expression of the individual opinions of the members. A resort to *casting lots*, or other expedient by which the judgment is determined by *chance*, is grossly irregular, and, where known to have occurred, would properly induce a disapproval of the finding.[1] So, a "compromise verdict" is objectionable and improper, except where the result of an honest modification of individual views, and the expression of a matured opinion.[2] The effect of compromise however is a point more apposite to the subject of the *sentence* than to that of the finding.

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[1] Simmons § 625; Kennedy, 184; O'Brien, 241, 263; G. C. M. O. 37, Div. Atlantic, 1890.

[2] "Statements by one juror to the rest of what he knows of the case should not be made or received, and if acted on they will furnish ground for a new trial." 1 Bishop, C. P. § 998 *a*. "The juror may use that general knowledge which any man may bring to the subject, but if he has a particular knowledge," (as of an expert or *quasi* expert character,) "he ought to be sworn and examined as a witness." Rex *v*. Rosser, 7 C. & P., 648. That a court martial may not allow its finding to be influenced by facts within the knowledge of individual members, but not in evidence, see G. O. 21, Dept. of the Ohio, 1866; Do. 20, Dept. of the South, 1866; G. C. M. O. 41, Dept. of Texas, 1874; Do. 8, Dept. of Arizona, 1874; DIGEST, 97.

[3] Evans *v*. George, 80 Ills., 51.

[4] DIGEST, 412–13. And see Chapter XVIII—"Number of Witnesses,"—"Manner of the Witness," and notes.

[5] G. O. 4 of 1843—remarks of Hon. J. C. Spencer, Secretary of War.

[6] See G. C. M. O. 179, Dept. of Dakota, 1883.

Majority Rule. Upon the finding, as elsewhere in the proceedings, the result—in all cases, whether grave or slight, and whether capital or other—is determined by a majority of the votes. If, for example, three members of a court of five vote Guilty on any charge or specification, the accused is legally convicted thereon. If—there being an even number of members—the vote is a *tie*, the accused is strictly neither convicted nor acquitted; but as he is certainly not convicted, the vote inures to his benefit and is equivalent to an acquittal, and the finding is entered on the record as Not Guilty.[3]

In capital cases. It has sometimes been supposed that a finding of Guilty of an offence for which the death penalty was prescribed must, to be valid, be made by a two-thirds vote, but this is a misconception. The 96th Article of war—the only law on the subject—simply requires a concurrence of two thirds of the members to sustain a death *sentence*. In the case of the *finding* a majority governs whatever be the character of the sentence, a bare majority being equally sufficient to sustain a capital sentence as a sentence imposing a slight penalty.

Modification of Finding. A finding once made may be modified at a subsequent session of the court before the final conclusion of the proceedings in the case. For example, where the court, after a finding of conviction, has adjourned before taking up the matter of the sentence, it may, on reassembling, decide first to reconsider its finding and may thereupon change it entirely, (substituting an acquittal for a conviction or *vice versa*,[1]) or modify it in any part.

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[1] See Delafons, 148. In the civil procedure, "any device by which the verdict is in any degree determined by chance is illegal and renders it void." 1 Bishop, C. P., 998 *a*. Such a finding is in general ground for ordering a new trial. Wharton, C. P. & P. § 732, 842.

[2] Compare Wharton, C. P. & P. § 842.

[3] Simmons § 616; Hughes, 85; Prendergast, 210; De Hart, 180; Coppée, 83; G. C. M. O. 17 of 1871; Do. 1 of 1872; Do. 38, Dept. of the Platte, 1868; DIGEST, 747. To the same effect was the maxim of the Roman law.—"*Paribus sententiis reus absolvitur.*"

The Finding an Act of the Court—Protest. In the findings as finally made and recorded, whatever they may be and however small may be the majority by which they were arrived at, the court acts as a *unit*. In law the finding is its act, not the act of certain members.[2] So, neither the majority nor any members or member can protest against a finding after it has been reached by a majority vote. No protest can be permitted to be entered in the record; nor can a member or members address a personal protest to the commanding general or other superior authority, without being chargeable with a grave irregularity.[3] In a case, in 1875, where the president of a court-martial added to the record a declaration to the effect that he disagreed with the majority in the finding of Guilty, stating his reasons,—his action was properly disapproved by the reviewing commander.[4]

Preserving the Votes. There existed at one time some difference of opinion among the authorities as to whether or not the paper ballots cast by the members of the court, in voting upon the finding, (or sentence,) should be preserved or some permanent minute of the same retained.[5] The better conclusion has prevailed that, in view of the provisions of Arts. 84 and 85 against the disclosure of the votes and opinions of the members, it is preferable to destroy the ballots, since otherwise they might fall into the hands of improper persons.[6] A further and sufficient reason for this course is that they are *no part of the record* of the court. It is therefore no part of the duty of the court to retain them, and the almost universal practice now is to destroy them at the conclusion of the proceedings with the other waste paper made on the trial.

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[1] See a case of a substitution of a conviction for an acquittal cited in Griffiths. 92.

[2] Kennedy, 205; De Hart, 187.

[3] Simmons § 469; Hough, (P.) 703; G. O. 19, Dept. of the Carolinas, 1866; DIGEST, 619.

[4] G. C. M. O. 24, Dept. of the Platte, 1875.

[5] See, as favoring the preserving of the votes, (or an abstract of the same,)—Adye, 224: 1 McArthur, 323; Delafons, 274; De Hart, 177: *Contra*—Simmons § 614; Kennedy, 237; Griffiths, 176; Benét, 127.

[6] Simmons § 614; Kennedy, who was Judge Advocate General of the Bombay Army, writes, (p. 237,)—"For my own part, from the first to

The Findings Must be Certain. That is to say they must have no uncertain meaning, but must be intelligible and exact.[1] This will be illustrated in treating presently of the various allowable *forms* of finding.

The Findings Must be Consistent and Harmonious. That is to say the finding on the charge must be responsive to that on the specification or specifications,[2] and the findings on both must be consistent and in harmony with each other; else they will be legally defective and will not support a sentence. Incongruous findings in general defeat each other—as will also be illustrated under the next head.

II. FORMS OF FINDING.

Finding of Guilty or Not Guilty. The simplest and most usual form of military verdict is where the accused is found "Guilty"[3] or "Not Guilty" of both the charge and the specification. Here the findings are consistent and harmonious, and the finding on the charge is supported by that on the specification. And this is also the case where there are several specifications under the charge, and the accused is found Guilty or Not Guilty of *one* of the specifications and similarly of the charge. For, however many specifications there may be to a charge, such a finding upon any one, (which is properly pleaded and apposite to the charge,) is sufficient to support a similar finding on the

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the last general court-martial at which I officiated as judge advocate, I made it a point, as soon as the proceedings were confirmed, to destroy carefully the votes and opinions of the members."

[1] Compare 1 Bishop, C. P. § 1005.

[2] 1 Bishop, C. P. § 1005.

[3] In the naval practice, a common form of convicting is to find "Proved;" and of acquitting—"Not Proved." Note, for example, the case of Medical Director Wales, in G. C. M. O. 21, Navy Dept., 1885, and now *passim* in the G. C. M. O. of that Department. Where the plea has been—"guilty," a usual form of finding, upon a specification, is—"Proved by plea."

charge, and—like a conviction on one good count of an indictment—to support a sentence.

But to find Not Guilty, (or Guilty without criminality,) of the specification, or of all the specifications where there are several, and then Guilty of the charge, is an inconsistent and incongruous verdict, since the finding on the specification or specifications deprives the charge of support,—leaves it wholly without substance,—and a finding of Guilty upon it is a nullity in law.[1]

On the other hand, to find Guilty of the specification, but Not Guilty of the charge, may be a good and legal verdict. It is such where the facts set forth in the specification do not as stated, or under the circumstances as developed by the evidence, constitute the military offence indicated by the charge. But where the specification is properly drawn, and the facts as averred therein must, if found, constitute such offence,—to find Guilty of the specification but Not Guilty of the charge is erroneous and contradictory, and such a finding will not support a sentence.

Confirming the plea. A familiar form of finding, (or rather of recording the finding,) upon a charge or specification, where the finding is the same as the plea, is by *confirming*, as it is expressed, the plea. But this form has no further or other effect than a simple finding of Guilty or Not Guilty as the case may be.[2]

Expression of acquittal. Where the accused is found Not Guilty on the charge or charges, it is usual to add in terms that he is *acquitted.* This is indeed unnecessary, since the findings as made fully acquit the party in law;[3] but the form is now so well recognized that to omit it in any case would be exceptional and invidious.

Guilty without Criminality. Usage has given sanction to a form of finding on a *specification*, of "Guilty but without criminality," or "attaching no criminality;" or in terms to such effect.[1] It is principally resorted to where the accused is found to have committed the acts or done the things alleged in the specification, but without the guilty intent or knowledge essential to constitute the military offence charged. Such finding will of course properly be accompanied by a finding of Not Guilty of the *charge*, unless indeed there be in the case some other specification upon which an unqualified finding of Guilty has been arrived at. This finding, however, is not one to be encouraged. It is virtually a form of acquittal,[2] being a determination that the accused is not guilty in law. It will therefore be more legally accurate, as well as more military and more just to the accused, to express and record the finding simply as "Not Guilty."[3]

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[1] DIGEST, 408. G. O. 60, 107, Army of the Potomac, 1861; Do. 95, Id., 1862; Do. 53, Dept. of the East, 1865; Do. 6, Dept. of Cal., 1865; Do. 9, Dept. of the Gulf, 1873.

[2] The form, that the court "confirm the plea of the prisoner," (without *adding* specifically that they find him Guilty or Not Guilty,) is expressly condemned by the reviewing authority in a case in G. O. 43, Dept. of the South, 1871.

[3] See McNaghten, 159.

Not Proven. This refinement, derived from the Scotch law, though at one time somewhat resorted to, is no longer sanctioned in either the English or American military practice.[4] While, as a substitute for "Not Guilty," this form may in some cases express more nearly than the latter the actual opinion of the court, it yet lacks the directness and conclusiveness desirable to be attached to the judgments of a court-martial, and, because of its ambiguity, can hardly fail to have a sinister and injurious effect upon the reputation of the accused. It is also objectionable as countervailing the legal principle that a man is to be held to be innocent till he is duly proved, *i. e.* proved beyond a reasonable doubt, to be guilty. This finding is, however, in common use in the *naval* practice.[5]

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[1] A more exact form would be that they "find the facts set forth but attach no criminality thereto." G. O. 11 of 1851; G. C. M. O. 30 of 1886; Do. 69, Dept. of the Mo., 1869. So in the Navy—"Proved without criminality."

[2] Circ., No. 4, Dept. of Pa., 1865. This form of finding has sometimes been resorted to where the accused has been found to have been insane or mentally deficient at the time of the offence. See instances in G. O. 13, Northern Dept., 1864; Do. 52, Dept. of the Gulf, 1862; Do. 49, Dept. of the Susquehanna, 1864. Properly, in such cases, the accused should be acquitted—the *ground* of the acquittal being specified; or the proceedings should be suspended, without making any finding, as indicated in Chapter XX—"Where the accused is insane."

[3] G. C. M. O. 30 of 1886; Do. 9, Dept. of the Mo., 1890.

[4] Kennedy, 195; Simmons § 625; Griffiths, 76; Bombay R., 31; O'Brien, 267; De Hart, 182; Benét, 133, Coppée, 83.

[5] See Commander Mackenzie's Trial, also current G. C. M. O.,

Partial Finding. This term implies a much more considerable authority than does the term "partial verdict" in the civil procedure.[1] The different kinds of partial findings recognized at military law are as follows:—

I. Finding with Exceptions—In Specifications. Where a court-martial determines that the accused is guilty of a *specification* but not precisely as laid, that is to say is guilty of a part but not of the remainder, or is guilty of the substance of the entire specification but not of certain details, it may, and it is its duty, in convicting him thereon, to except specifically from the finding of Guilty such portions as are not proved, and thus declare the *exact measure* of the criminality deemed to be established.[2] Thus, it may find him Guilty of the facts set forth in certain of the averments, and Not Guilty of those set forth in certain other averments; or it may find him Guilty of the specification as a whole except only as to certain designated words, amounts, articles, quantities, or other matters of description set forth therein.[3] Having thus shaped its finding on the specification according to the proof, it may find the accused Guilty of the *charge*, provided of course there is enough left in the specification to support the charge. If so much has been excepted as not to leave enough to constitute the specific offence alleged, (or a minor offence legally included in it,) or if the effect of the exception has been to cause the specification to describe another and quite distinct offence from that designated by the charge,—a finding of guilty upon the charge cannot be sustained, unless indeed there be in the case some *other* specification or specifications apposite to the charge upon which a substantial conviction has been arrived at. The most simple and familiar illustration of an ex-

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Navy Dept., *passim*. A variation of this form, often occurring, is—"Not proved in part," (specifying what part;) or "Proved except" certain words or allegations, (specifying or indicating the same,) "which words are not proved." As to *Substitutions*, see *post*.

[1] See 1 Bishop, C. P. § 1009.

[2] See DIGEST, 409; De Hart, 181; O'Brien, 264; G. O. 59, Army of the Potomac, 1861; Do. 34, Dept. of the Cumberland, 1867; Do. 2, Id., 1870; G. C. M. O. 59, Dept. of Texas, 1872. This form of finding is now adopted in the British law. See Rules of Procedure, 43.

[3] Cases of extended exceptions may be noted in G. O. 43, 159, 282, of 1863; G. C. M. O. 160, 170, 191, of 1864; Do. 303, 565, 607, of 1865; Do. 19 of 1885.

ception detracting from the legal virtue of a specification is the excepting by the court of the word or words which express the *gravamen* of the offence in law. As where the charge is Violation of the 60th Article of war, and the specification alleges the "knowingly" presenting of a fraudulent claim upon the United States: here, if the court, in convicting upon the specification, excepts the word "knowingly," it acquits the accused of the *gist* of the offence, and cannot, (upon such finding alone,) legally convict him under the charge.[1] Such instances, however, are now rare, while exceptions which yet leave the substance of the specification unaffected are frequently and judiciously resorted to in the practice of our courts-martial.

In charges. What has last been remarked has reference only to the *specification*, occasions for making exceptions in *charges* being seldom presented. It is only indeed where the charge is inartificially and faultily drawn, or is "double," or expresses more than the offence found, that an exception therein would be likely to be made. Thus in a case published in Orders of the War Department where one of the charges was "Embezzling and misapplying military stores," the finding of the court thereon was "Guilty, excepting the words 'embezzling and.'"[2] Where the charge is duly worded according to the terms of the Article of war upon which it is based, it is properly indivisible, and an exception of any part made in the finding will not be legitimate. Thus where the charge is "Conduct unbecoming an officer and a gentleman," to except from the conviction thereon—as was done in some early cases[3]—the words "and a gentleman," and find the accused guilty of conduct unbecoming an officer only, (or of "unofficerlike conduct,") would be irregular and unauthorized.[4] The latter is not an offence specifically known to the military law, and if, in such a case, the court do not consider the conduct to be unbecoming a gentleman as well as an officer, they should either acquit the accused altogether, or find him guilty of "Conduct to the prejudice of good order and military discipline."

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[1] See the point illustrated in G. O. 28 of 1859; Do. 34, Dept. of the Mo., 1863; Do. 20, 54, Northern Dept., 1864; Do. 28, Dept. of the N. West, 1865; Do. 11, Dept. of the Cumberland, 1867; Do. 41. Dept. of the Platte, 1870; also DIGEST, 409.

[2] G. O. 341 of 1863. As to the loose joining of embezzlement, misappropriation and misapplication in charges under Art. 60, see *post*, Chapter XXV.

[3] As in the case of Captain S. T. Dyson, where this finding was approved without comment. Am. S. P., Mil. Af., vol. 1, p. 588.

[4] This finding, which had been previously sometimes made by courts-martial, (as in Capt. Dyson's case, G. O., Tenth Mil. Dist., Nov. 17, 1814, where it was approved without remark by Maj. Gen.

2. Finding with exceptions and substitutions. The authority of a court-martial to make a partial finding is not limited to the mere making of exceptions. Where, while the allegations in a specification are substantially made out, certain items therein are not precisely proved as averred, the court, in excepting the same, may *substitute* the true facts or details as established by the evidence. As, for example, where sums of money, numbers of things, kinds or quantities of articles, species of military stores, &c., words spoken, names of persons, dates, or places, have been incorrectly set forth in the specification, and the true particulars have been disclosed in the course of the testimony on the trial; in such cases the court, in its finding of Guilty, may and properly will except the erroneous and substitute for them the correct statements or words of description.[1] The authority to make substitutions is subject to the same conditions as the authority to make exceptions, *viz.*, that the specification shall not be rendered legally defective, or the nature of the offence so modified that the finding upon the specification will not support a conviction upon the charge.

In regard to the authority to except and substitute in findings, it may be remarked that it is certainly one of no little practical value and convenience. By its exercise defects in the pleadings may to a considerable extent be remedied, and variances between

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Scott,) was finally condemned and discontinued, as a finding neither of a lesser included offence nor of any offence known to military law, by G. O. 8 of 1856. And see G. O. 48, Dept. of Dakota, 1871; De Hart, 373; O'Brien, 161.

[1] See Simmons § 852–855; DIGEST, 409; and instances in G. O. 41, 353, 375, 396, of 1863; Do. 5, 7, 53, of 1864, G. C. M. O. 314, 325, of 1864; Do. 356, 422, of 1865; Do. 187 of 1866; Do. 54 of 1888; Do. 21 of 1889; Do. 24, Dept. of Texas, 1890.

A similar form is frequently observed in the naval practice. Thus, in G. C. M. O. 10, Navy Dept., of 1889, is the finding—"Proved except," or "Proved in part—proved except," (indicating certain words,) "which words are not proved, and for which are substituted the words italicized," (in the specification as published,) "which words are proved." And see instance in G. C. M. O. 82, Id., of 1892.

the pleadings and the proof be in the main cured. Moreover, the finding is thus made to correspond with the precise facts of the case, justice to both sides is more nearly done, and the accused is the more effectually protected against a second prosecution based upon the same transaction. It is of course always desirable in military cases that, where practicable, the charges and specifications should be so drawn, and the case so prepared, that the averments will accurately represent the facts, and the testimony will verify in detail the averments: where this can be done, it will rarely be necessary to qualify the findings in the manner indicated.

Conviction of a Lesser Kindred Offence. This is a species of partial finding familiar to the civil procedure, and which at military law illustrates also the practice of exception and substitution. It is properly resorted to where the offence charged is one which includes, as a necessary constituent, another offence of lesser gravity, and where the evidence—the accused having pleaded Not Guilty—falls short of fixing upon the accused the superior but shows him to have committed the inferior offence. In such cases the court may find him Not Guilty of the offence charged but Guilty of the minor constituent.[1] And it *should* so find, since otherwise the true degree of criminality in the case will not be pronounced, and the accused will escape conviction and puuishment altogether; for if simply found Not Guilty of the major offence he is fully acquitted of the minor contained within it.

Thus, under a charge of desertion, where the testimony, while showing an unauthorized absence, fails to fix upon the offender the *animus* peculiar to desertion, the court may and properly will find him *not guilty of desertion*, *but guilty of absence without leave*, and this whether his plea has been to such effect or he has simply pleaded Not Guilty.[2] Similarly, manslaughter may be found under a charge of murder, larceny under robbery, and an attempt to commit an offence under a charge for the offence itself.[1]

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[1] See Adye, 214; Tytler, 321; Simmons § 622; Kennedy, 185; Maltby, 72; Macomb, 63; O'Brien, 265; De Hart, 185; DIGEST, 410. And compare Grant *v.* Gould, 2 H. Bl., 69; Reynolds *v.* People, 83 Ills., 479; Bankhead *v.* U. S., 20 Ct. Cl., 405. Note also the similar authority given in criminal cases in the United States courts, by Sec. 1035, Rev. Sts.

[2] 13 Opins. At. Gen., 460. Where an accused deliberately and intelligently pleads Guilty to a charge of desertion, he cannot legally be convicted of absence-without-leave under it. See G. O. 231, Fifth Mil. Dist., 1869; Do. 24, Dept. of the Platte, 1871.

Wherever a lesser offence is thus found, the findings upon the specification and the charge should be so framed as to be consistent, and the finding on the specification should be such as to support the finding on the charge. With this view, there should properly be *excepted* from the specification such words as in law characterize only the superior offence. Thus, in finding manslaughter under a charge of murder, the allegation of *malice aforethought* in the specification, should be in terms excepted from the finding of Guilty thereon, and as to this the accused should be found Not Guilty. So, where, under a charge of desertion, the specification sets forth that the accused "did desert," &c., the court, if proposing to find Not Guilty of desertion but Guilty of absence-without-leave, should, from the finding of Guilty upon the specification, *except* the words alleging or describing a desertion; otherwise the two findings will be inconsistent. And, in so excepting, the court should further *substitute* the words—"did absent himself without authority," or other words properly descriptive of the real offence.[2]

It need scarcely be noted that while a court-martial may always convict of a lesser kindred offence, it is not empowered to find a higher or graver offence than the one charged, nor an offence of a different nature.[3] Murder cannot be found under a charge of manslaughter, nor robbery under a charge of larceny; nor, on the other hand, can burglary be found under an indictment for larceny or arson. Similarly, drunkenness on duty cannot legally be found under a charge of simple drunkenness or disorderly conduct, nor can conduct unbecoming an officer and a gentleman be found under a charge of drunkenness on duty.[1] And this though the evidence clearly shows that the greater or the distinct offence was the one actually committed; for a party cannot be convicted of an offence of which he has not been notified that he is charged and which he has had no opportunity to defend.

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[1] See Dynes *v.* Hoover, 20 How., 79, where the finding, by a naval court-martial, of an *attempt to desert*, under a charge of desertion, appears to be recognized as legitimate. And see with this the case of Bankhead *v.* U. S., 20 Ct. Cl., 405. This finding is now expressly authorized by the British Army Act, Sec. 56.

In Prindeville *v.* People, 42 Ills., 217, the court, in affirming a conviction of assault with intent to commit rape under an indictment for rape, remark, generally, that—"Where the prosecution must prove every fact necessary to constitute the lesser offence, together with the additional facts which make it the higher offence, in order to justify a conviction for the latter, then a conviction may be had for the lesser offence under an indictment for the greater."

[2] DIGEST, 410. A simple finding, under a charge of desertion, of "Not Guilty but Guilty of absence-without-leave," *unaccompanied by any exceptions or substitutions*, though irregular and exceptional at military law, would yet be legal and effectual. Compare Morehead *v.* State, 34 Ohio St., 212.

[3] Kennedy, 185; Simmons § 700; Maltby, 72; Macomb, 63; O'Brien, 265; DIGEST, 410.

Conviction under one Article of War of a Violation of another Article—*Conviction of Conduct to the prejudice of good order and military discipline, under a specific charge.* Though at one time otherwise ruled,[2] it is now fully settled by the uniform practice of the service that where the charge is of one of the specific designated offences made punishable by the Articles of war other than the general, or 62d, Article, and the evidence fails fully to sustain the charge as laid, but fixes upon the accused a neglect of duty or disorder as involved in the acts alleged in the specification, the court may properly find him Guilty of the specification, (with such exceptions, &c., as may be required,) and Not Guilty of the charge but Guilty of Conduct to the prejudice of good order and military discipline.[3]

This finding, of an offence in violation of the general Article under a charge for a violation of a specific Article, was first sanctioned where the charge was "Conduct unbecoming an officer and a gentleman," in violation of Art. 61, and is still most frequently resorted to thereunder.[4] It has since, however, been extended to *all cases of charges of specific offences* made punishable by the code, having been especially applied to such as Disobedience of Orders, Disrespect to a commanding officer, Mutiny, Misbehaviour before the enemy, Breach of arrest, Violations of Art. 60, and—in time of war—Violations of Art. 58.

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[1] See G. C. M. O. 6, Dept. of the Gulf, 1876; G. O. 14, Army of the Potomac, 1864.

[2] In G. O. 17 of 1856; Do. 28 of 1859.

[3] See G. C. M. O. 8, Div. Atlantic, 1889.

[4] See 18 Opins. At. Gen., 114; Swaim *v.* U. S., 28 Ct. Cl., 173. The same form is found in the Navy. See G. C. M. O., 29, 30, Navy Dept., 1882. A corresponding frequent naval form is that of a conviction *in a less degree than charged.* Thus, in a case of an accused charged with Drunkenness on duty, but found to have been drunk but not on duty, the formal finding would be—"Guilty in a less degree than charged; guilty of drunkenness."

The legal theory upon which this form is based is that it is a finding of a *lesser included offence*, every specific offence being viewed as including either *a neglect of duty or a disorder in breach of discipline;* and it is resorted to in order to prevent the failure of justice which would in general be incurred were it not availed of. It should not, however, be employed where the specific offence charged is substantially established beyond a reasonable doubt. For though it might be agreeable to the court to relieve the accused of some share of the culpability thus fixed upon him, such action would be an evasion of responsibility on its part and a dereliction of duty under its official oath.[1]

Conviction of a specific offence under a charge of another offence. The authority, however, to employ this form does not extend beyond the cases above indicated. Thus the reverse of this finding—that is to say a finding of Guilty of a *specific* offence under a charge of "Conduct to the prejudice of good order and military discipline"—is not sanctioned, and, if made, would be disapproved as a gross irregularity.[2] Thus a conviction of a violation of Art. 21, (a capital offence,) could not legally be made under a charge of a violation of Art. 62.

And so of a finding of one *specific* offence under a charge of another specific offence. Thus findings of guilty of Conduct unbecoming an officer and a gentleman under a charge of Drunkenness on duty, of guilty of Mutiny under a charge of Misbehaviour before the enemy, of guilty of a Violation of the 32d Article under a charge of Violation of the 33d or 40th,[3] of guilty of a Violation of the 33d Article under a charge of Violation of the 32d or the 21st,[4] of guilty of a Violation of the 40th Article under a charge of Violation of the 47th,[5] and of guilty of Violation of the 17th Article under a charge of Violation of the 60th—have been properly disapproved as without legal sanction and inoperative. In such cases the accused is convicted of an offence not alleged against him or included in that alleged,—an offence of which he has had no notice and to which he has not been called upon to plead or to make defence.[1]

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[1] G. C. M. O. 6, Dept. of the Platte, 1882.

[2] G. C. M. O. 78, Dept. of the Mo., 1874; Do. 6, Dept. of the Gulf, 1876.

[3] G. C. M. O. 24, Dept. of Texas, 1891.

[4] G. C. M. O. 91, Dept. of the Platte, 1892.

[5] "A soldier may be guilty of this offence," (quitting guard,) "without absenting himself from his command, and therefore it contains no element of desertion." Gen. Schofield. G. C. M. O. 53 of 1888.

It may be added that a finding under a specific Article may be sustained as a valid finding of "Conduct to the prejudice of good order and military discipline," though not formally so expressed, if it be in substance an equivalent. As where, under a charge of a Violation of Art. 21, the finding is Not Guilty but Guilty of "insubordination," or where under a charge of Drunkenness on duty in violation of Art. 38, the finding is Not Guilty but Guilty of "simple drunkenness."[2] Such forms, however, are now rare.

Conviction of a Lesser Degree or Grade of a Criminal Offence. While the military law does not recognize grades or degrees of criminal offences cognizable by courts-martial, such courts, when passing judgment, in time of war, upon crimes of the class specified in Art. 58, have in a few cases made findings of a lesser degree of the crime charged. So, military commissions, when acting as substitutes for the State courts under the Reconstruction Laws, have sometimes made similar findings. Such instances are now unknown in practice.[3]

III. ADDITIONS TO THE FINDING.

It is a peculiarity of the military procedure that a court-martial, in its judgment, is not confined to a bare acquittal or conviction, but may characterize or explain the finding, (or sentence,) or accompany it with animadversions, recommendations or other remarks, as follows:—

1. Thus, in pronouncing the accused Not Guilty, the court, in lieu of a simple acquittal, may "*fully*," or "*honorably*," or "*fully and honorably*" acquit. These terms add nothing to the legal

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[1] G. O. 14, 27, Army of the Potomac, 1864; G. C. M. O. 8, Div. Atlantic, 1889; Do. 57, Dept. of the Platte, 1891; Do. 53, (H. A.,) 1888; Do. 20 (Id.), 1887; Do. 123, Dept. of Cal., 1882.

[2] Pipon & Col., 154.

[3] The naval form of "*Guilty in a less degree than charged*," has already been adverted to.

effect of the acquittal, but are still occasionally employed, though less so than formerly.[1] "*Honorably*," according to the authorities,[2] is not in general to be employed except in cases where the alleged offence is not merely a violation of military duty but one of which a conviction would have dishonored the individual—as, for example, conduct unbecoming an officer and a gentleman, misbehaviour before the enemy, embezzlement or other fraudulent act made punishable by Art. 60. This and the other like forms, however, should be reserved for exceptional cases, since their use, if more frequent, would detract somewhat from findings of Not Guilty when expressed *without* such embellishment.[3]

2. The court, in connection with an acquittal, may also *reflect upon the charges* as malicious, frivolous, vexatious, unfounded, &c.,[4] or upon the *accuser or prosecutor*, (or prosecuting witness,) as actuated by personal animosity or other improper motive,[5] or as equally culpable with the accused, or more culpable—recommending that he be himself brought to trial,[6] or as offending against military usage by preferring stale or accumulated charges, &c.[7] Such comments, however, are not now frequent in our practice, the court commonly leaving this class of criticisms to be made by the reviewing authority.[8]

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[1] Maj. Gens. Schuyler, St. Clair, and R. Howe, were acquitted "with the highest honour." See 3 Journals of Congress, pp. 142, 158, 714. (December, 1778, and January, 1782.) Recent cases of "honorable" or "full and honorable" acquittal are published in G. C. M. O. 20 of 1885; Do. 69 of 1892, (a case of an enlisted man;) Do. 125, Dept. of Cal., 1884; Do. 34, Dept. of Arizona, 1886. The form—"fully acquit," appears in G. C. M. O. 29, Navy Dept., 1891.

[2] Simmons § 624, 625; Kennedy, 196; Griffiths, 77; Bombay R., 31; Clode, M. L., 151–2; Maltby, 71; O'Brien, 268; De Hart, 182.

[3] See De Hart, 182.

[4] 2 McArthur, 264, 266; Simmons § 703; Kennedy, 197; De Hart, 183; O'Brien, 268; G. O. of Nov. 11, 1816, (Maj. Gen. Gaines' case;) Do. 8, Middle Dept., 1865. And see Jekyll *v.* Moore, 2 Bos. and Pull, (N. R.,) 341. In a G. O. of Nov., 1817, the court, in declaring certain charges to be "frivolous," adds that it attaches no censure to the judge advocate who subscribed them, since he had done so merely *ex officio.*

[5] See cases in James, 35, 203, 266, 461, 727, also Simmons § 701, 702, (Cases of Lt. Col. Keating and Capt. Wathen;) Hough, 504, 533; Kennedy, 170; Clode, M. L., 151; O'Brien, 268; De Hart, 183; G. O. 3 of 1853; (remarks of Maj. Gen. Scott.)

[6] 2 McArthur, 267; Delafons, 278.

[7] James, 539.

[8] See Chapter X—THE CHARGE, p. 200, *note.*

3. The court may *animadvert upon the statement* or argument of the accused, (or judge advocate,) as being disrespectful or otherwise objectionable in tone or particular language.[1] It may also reflect upon any *improper conduct*, during the trial, of either of the parties, counsel, or witnesses, and may—in a clear case—remark upon the *testimony* of the latter as inspired by personal feeling or prejudice: comments, however, upon civilian witnesses and persons will naturally and properly be more guarded than need be those upon members of the army. Where a witness is believed to have sworn falsely, the facts should be specifically brought to the attention of the reviewing commander.[2]

4. Where the evidence has disclosed a *defective state of discipline* or an objectionable practice at a post, &c., the court, in its discretion, has sometimes remarked upon the same, recommending administrative changes or reforms.[3]

5. Courts-martial are sometimes induced to add *explanations* of their findings or to give the reasons therefor, especially where the same, in view of the character of the testimony, may appear to require justification. Such action, however, must in general be unnecessary and unadvisable.[4]

6. Where indeed the evidence or proceedings indicate *insanity* or other mental incapacity on the part of the accused, the court, in acquitting, (or convicting,) will properly state the facts, and may add such *recommendation*—as that the accused be discharged from the service, or committed to the Government Asylum—as may seem to be called for.[5]

Limitation of the authority. But—it may here be noted—

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[1] Simmons § 704; James, 461; O'Brien, 268; Lieut. Kennon's Trial, 63-4.

[2] As to reflections upon the testimony or deportment of *witnesses*, see James, 366, 539; Simmons § 705, (Case of Captain Theobald O'Doherty;) Kennedy, 197; Hughes, 85; O'Brien, 268; De Hart, 183-4.

[3] Simmons § 702; Bombay R., 58; O'Brien, 268; De Hart, 183. It is preferable, however, that this should be done by the Reviewing Authority. See remarks of President Cleveland in G. C. M. O. 27 of 1888.

[4] See instances in G. O. 374 of 1863; G. C. M. O. 73, 74, 200, of 1864; and remarks of reviewing officer in G. C. M. O. 21 and 36 of 1889.

[5] See Simmons § 590; Kennedy, 195; O'Brien, 266; G. O. 46 of 1824; Do. 36 of 1825; Do. 20, Western Dept., 1861; Do. 52, Dept. of the Gulf, 1862.

while the court may sometimes properly recommend or suggest action to the reviewing commander, it may not itself assume to take action pertaining to his province. Thus where the court, in acquitting a soldier, directed that he "be discharged from arrest and returned to duty with his regiment," this addition was properly disapproved as transcending the authority of a court-martial.[1]

In cases where a *conviction* is arrived at, any such additions as here specified, if any are made, are inserted *after the sentence.*

Where the Finding arrived at upon a trial is one of conviction, the court will naturally proceed to the consideration of its *sentence.* As a preliminary, however, to such action, in cases of enlisted men, the court may at this stage be required to be reopened for the introduction of *previous convictions* of the accused.[2]

Receiving of evidence of Previous Convictions. This proceeding, suggested by that authorized in the British law, (Rules of Procedure, § 45,) was ingrafted upon our military practice by a ruling of the Secretary of War of February 15, 1886,[3] which was, by his direction, published in the form of an army regulation, in General Orders, No. 41, of June 26, 1886.[4] Its object was to ascertain, by an inquiry into his previous record, whether the accused was an old offender, with a view, if he were found to be such, of increasing the measure of his punishment and especially of inducing in his case a sentence of dishonorable discharge from the service. Such evidence would also indicate, for the information of the reviewing officer, that he was, in the words of the regulation, "less entitled to leniency."[5] In the Army Regulations of 1889, this regulation was published as par. 1018.

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[1] G. O. 60, Army of the Potomac, 1861.

[2] Such evidence is of course offered only after a finding of Guilty. It cannot be introduced where there has been an acquittal. See G. C. M. O. 18, Div. Atlantic, 1891.

[3] Circ. No. 1, (H. A.,) 1886.

[4] This evidence had previously in a few cases been introduced, without sanction of law. See note on page 550, edition of this work of 1886.

[5] See Circ. No. 1, (H. A.,) 1886.

This regulation, having been several times modified, was finally amended by G. O. 16 of March 25, 1895, in which it appears in the following form:—

"In every case when an offence on trial before a court-martial "is of a character admitting of the introduction of evidence of "previous convictions, and the accused is convicted, the court, "after determining its findings, will be opened for the purpose of "ascertaining whether there is such evidence, and, if so, of hear-"ing it. These convictions must be proved by the records of "previous trials, or by duly authenticated orders promulgating "the same, except in the cases of conviction by summary court, "when a duly authenticated copy of the record of said court shall "be deemed sufficient proof.[1] Charges forwarded to the author-"ity ordering a general court-martial, or submitted to a sum-"mary, garrison, or regimental court, must be accompanied by "the proper evidence of such previous convictions as may have "to be considered in determining upon a sentence."

As to the efficacy of the evidence of previous convictions in inducing or increasing punishment, G. O. 16 of 1895 declares as follows:—

"When a soldier shall be convicted of an offence the punish-"ment for which, as authorized by Article II of this order or the "custom of the service, does not exceed that which an inferior "court-martial may award, the punishment so authorized may be "increased by one-half for every previous conviction of one or "more offences within eighteen months preceding the trial and "during the current enlistment; provided that the increase of "punishment for five or more previous convictions shall not ex-"ceed that thus authorized when there are four previous con-"victions, and that when one or more of such five or more "previous convictions shall have been by general court-martial, "or when such convictions shall have occurred within one year "preceding the trial, the limit of punishment shall be dishonor-"able discharge, forfeiture of all pay and allowances, and con-"finement at hard labor for three months.[2]

"When the conviction is of an offence, punishable under Ar-"ticle II of this order or the custom of the service with a greater "punishment than an inferior court-martial can award, but not

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[1] Compare Circ. No. 12, (H. A.,) 1891, par. II.

[2] See the recent Circ. No. 7, (H. A.,) of June 1, 1895.

"punishable with dishonorable discharge, the sentence may, on "proof of five or more previous convictions within eighteen "months and during the current enlistment, impose dishonorable "discharge and forfeiture of all pay and allowances in addition "to the authorized confinement, and when this confinement is "less than three months it may be increased to three months.

"When a non-commissioned officer is convicted of an offence "not punishable with reduction, he may, if he shall have been "convicted of a military offence within a year and during the "current enlistment, be sentenced to reduction, in addition to the "punishment already authorized."

The "Order" of 1895, as will be perceived, is mandatory in terms, ("the court * * * *will be opened*," &c.,) and it should therefore be strictly complied with.[1] Copies of records introduced in evidence may of course be contested by the accused, as to the genuineness or correctness of the record,[2] but should not be rejected for immaterial and presumably clerical errors in the copy.[3]

The Order requires that orders of promulgation introduced in proof of convictions shall be "duly authenticated." They should therefore be attested by the signature of the Commander or of his adjutant general or other staff officer, or by that of the Adjutant General of the Army. If not duly authenticated, they should not, until the defect be remedied, be received by the court;[4] unless, being apparently genuine on their face, the accused may waive a formal authentication. Although the Order, (unlike its predecessor, G. O. 21 of 1891,) does not in terms require that the orders of promulgation shall show "the exact offences of which the soldier was convicted," it is clear that such an order should exhibit specifications as well as charges where the specific offences are not fully indicated by the latter alone.[5]

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[1] G. C. M. O. 38, Dept. of Texas, 1892.

[2] G. C. M. O. 38, Dept. of Dakota, 1892.

[3] G. C. M. O. 88, Dept. of the Platte, 1892.

[4] G. C. M. O. 49, Div. Atlantic, 1887; Do. 10, Dept. of Texas, 1888. It need hardly be noted that, as held in Do. 21, Dept. of Arizona, 1891, the "statement" required by par. 1015, A. R., cannot serve as evidence of previous convictions. See Circ. No. 13, (H. A.,) 1890.

[5] Circ. No. 14, (H. A.,) 1890; G. C. M. O. 20, Div. Atlantic, 1891; Circ. No. 10, Dept. of Arizona, 1892.

The conviction, whether exhibited by a copy of the record of trial or by an order of promulgation, must appear to have been duly approved.[1] The evidence of the convictions need not be specifically referred to the court by the convening commander: it is sufficient if they come to the hands of the judge advocate with the charges, or are obtained by him from the proper official.[2]

As to the proof of previous convictions on trials by *summary courts*, it is prescribed by Circular No. 2, of 1892, as follows:—"It is the duty of the officer who brings charges before a summary court for trial to submit evidence of previous convictions, "or to cite them when the convictions have been by the same "court. But when evidence of previous convictions is not thus "submitted or cited, the officer acting as the court may take "judicial knowledge of what appears upon the records of his own "court."

Objections to introduction of this evidence. When the above-mentioned Army Regulation, par. 1018, was originally published, sundry objections were made to it which were all more or less reasonable and cogent. These, mainly, were—1. That the proof of the previous convictions tended to prejudice the court against the accused in adjudging the sentence: 2. That the introduction of such evidence, in making apparent that there had been a conviction, was at variance with the spirit of Art. 84, which requires the members to make oath that they will not disclose any votes or opinions of members: 3. That the regulation, in contravention of an established rule of evidence, substantially authorized the introduction of evidence of bad character before due foundation had been laid therefor by the introduction of evidence of good character on the part of the accused: 4. That it intrenched upon the province of the reviewing officer, by whom alone, not by the court, such evidence could properly be entertained.

The regulation, however, having now assumed a mandatory form, such objections cannot profitably be raised in practice. In the opinion of the author indeed, the rules laid down as governing the introduction of these convictions are artificial and confusing, and the convictions themselves are much more appropriate for the consideration of the *reviewing authority* than for that of the court. A regulation confined to a requirement that such information should be submitted to the commander, for examination in connection with his review of the proceedings of the trial, would, it is believed, be more in harmony with the principles of the law of evidence and with justice than the present mandate.

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[1] Circ. No. 10, (H. A.,) 1893.

[2] G. C. M. O. 44, Dept. of the East, 1892.

CHAPTER XX.

SENTENCE AND PUNISHMENT.

THE Finding having been completed, and having resulted in a conviction upon the Charge or upon some one at least of the Charges where there are several, or in a conviction of a lesser offence included in one charged,—and, (the case being one of an enlisted man,) the proper evidence of previous convictions, if any, having been introduced—the court next proceeds to adjudge the SENTENCE, *i. e.* to affix a penalty or penalties for the offence or offences found.[1]

The subject of this Chapter will be conveniently presented under the following heads:—

I. The Course of Proceeding.
II. Classification of Sentences.
III. Principles governing the imposing of Discretionary Sentences.
IV. Principles governing the framing and substance of the Sentence in general.
V. The specific punishments separately considered.
VI. Prohibited and Disused Punishments.

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[1] The term "Sentence" is now uniformly applied in practice to the formal designation by the court of the punishment or punishments. In the Resolutions of the Continental Congress, (see 3 Journals, 144, 158, 714; 4 Id., 268,) "sentences" of *acquittal* are sometimes referred to, the word sentence being employed as a general term equivalent to judgment. So, in the record of Gen. Wilkinson's trial, in 1811. And note a similar use of the word in cases reported by James, pp. 281, 462, 463, 471, 639, 760, 786, 791, 794, 820, 823; also in case cited by Simmons § 563.

In the General Orders of the period of our Revolution, a sentence of court-martial is often designated as an "*opinion*." See Washington's Newburg G. O. of May 2, of May 12, and of August 28, (Maj. Gen. McDougall's Case,) 1782; also G. O. of Oct. 31, 1780, &c. It was evidently appreciated at this early day that a sentence of a court-martial was no more than a submitted estimate or recommendation.

VII. Remarks with Sentence, and Recommendation.
VIII. Disciplinary Punishments.

I. THE COURSE OF PROCEEDING.

Voting and Deliberation. Where the Article or Articles of war, under which the accused has been convicted, is or are mandatory in expressly requiring a certain punishment or punishments specified to be imposed upon conviction, the office of the court simply is to cause the legal sentence to be entered of record by the judge advocate, no discretion being allowed and no deliberation or vote being called for. In cases, however, in which the sentence is left by the code to the discretion of the court, the members, the verdict being completed, commonly proceed at once to vote for a punishment or punishments, in the manner usually observed upon the Finding, and already indicated. The court may of course take an *adjournment* between finding and sentence if deemed proper and expedient.

The voting may be either oral and open, beginning with the "youngest in commission" of the members as directed in Art. 95; or in writing and secret, the member's name not being appended to his vote. The latter form is, except in simple cases, that usually pursued: it is also in general the preferable one, not only because, the votes of individuals not being known, there can be no danger that the opinion of a senior member will unduly influence that of a junior, but also for the reason that the different awards, combining as they may several distinct penalties, will, when expressed in writing, be the more definite and explicit and the more readily compared.

The ballots—the judge advocate being excluded at this stage—are properly collected by the president, and counted and their contents or result announced by him. Where no punishment is found to be concurred in by a majority upon the first vote, further votings are to be had until—if practicable—some final sentence comes to be approved by a majority of the members present.[1]

After the first vote, or at any other stage of the voting, the members, with a view to the reconciling of differences of opinion, may engage in such discussion as may be desirable; and here, as upon the Finding, the equality of the members is to be preserved, a junior being entitled to the same freedom of expression and the same consideration as a senior.

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[1] As to the form in general pursued in voting upon the sentence, see Tytler, 311; Griffiths, 84; Hughes, 90; Maltby, 82; O'Brien, 269.

Where the sentences originally voted are found all to differ, it has been an approved practice for the court to proceed to vote upon them in succession, beginning with the least severe, until one of them receives the vote requisite for its adoption.[1] A majority of the votes may sometimes be found to concur in some one penalty or more: in such a case the proceedings will be simplified by treating such penalty or penalties as agreed upon; the voting being then resumed upon the other propositions. The practice which has prevailed somewhat in British courts-martial of voting—when opinions differ—first upon the *species* of the punishment, and then upon the *quantum*,[2] has not been common with us, but may of course be resorted to if thought proper.

It may be remarked indeed that neither law nor regulation has prescribed any special routine to be pursued in the making up of the sentence. The usual form, as above outlined, is thus subject to variation at the discretion of the court, which may indeed, if it see fit, dispense with voting altogether, and arrive at its conclusions by a comparison of views in an informal conversation.

Case of joint accused. When two or more persons have been tried on joint charges and convicted, their sentences must be *several*, although the punishments awarded be the same. If the sentence be discretionary with the court, a *separate voting* or concurrence should therefore be had as to the sentence of each of the accused.

Majority and Two-thirds Votes. The question of the selection of the sentence, or of any punishment, like all other questions arising in the procedure of our courts-martial, is, (except in the single instance of the death penalty,) determined by a majority vote. In the excepted case two-thirds of the members present and acting must—as required by Art. 96—concur; *i. e.* four of a court of five members, five of a court of seven, six of a court of nine, eight of a court of eleven, and nine of a court of thirteen. In all other cases a simple majority is sufficient, as it is necessary, to impose a punishment. A *tie* vote, given where there is an even number of members, is futile and determines nothing. Where it occurs, the voting must be continued till a majority in favor of a certain sentence or punishment is obtained.

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[1] O'Brien, 270.

[2] Simmons § 641; Griffiths, 84; Hughes, 91, 93; Manual, 531; O'Brien, 270.

The deliberation or voting need not of course be prolonged where, after repeated votes or comparison of views, the difference is found to be *irreconcilable.* In such a case the court, in lieu of coming to a formal sentence, can only enter upon the record the fact that they are wholly unable to agree, and thus terminate the proceeding, subject to the action of the reviewing authority. Such a contingency would be most likely to happen where—the sentence being discretionary—there was an even number of members: in any event, however, it would be of rare occurrence.

Duty of Members who on the Finding Voted to Acquit. A marked diversity of opinion once prevailed upon the point whether the members, (where the sentence was discretionary,) were obliged to vote a sentence without regard to what may have been their vote upon the finding,—whether, in other words, those who had voted for an acquittal might not properly be excused from voting a punishment. At the first impression it might seem unreasonable and inconsistent that a member, fully persuaded that the accused was innocent, or at least that the evidence had failed to convict him beyond a reasonable doubt, and who had voted accordingly, in the minority, for an acquittal, should at the next moment be required to adjudge that a specific punishment be imposed upon him as upon a guilty person. But this apparent inconsistency disappears when the principle is recalled, which has heretofore been set forth as resulting from the fundamental rule of the government of the majority in court-martial proceedings; *viz.* that the finding, when completed, becomes the act and judgment of the court as a *unit*, the opinions of the majority and minority no longer existing as such but being absorbed in the conclusion of the whole. Where, therefore, the accused has been found guilty, the conviction is to be recognized and acted upon by each member as a fixed fact—as something which has passed out of the region of individual opinion and become ascertained and concluded. Though he may have voted not guilty, he is to vote upon the sentence precisely as if he had voted for a conviction, or as if the fact of guilt had been determined by some competent agency wholly independently of himself, and the rightfulness of such determination was beyond question.[1]

Further, he must not only vote a sentence but—when the punishment is discretionary—an adequate sentence, *i. e.* one commensurate to the offence or offences found. If, having voted to acquit, he gives his vote for a slight and inadequate penalty, he fails in his full duty as an officer and member of the court.[2]

Some Sentence Necessary on Conviction. But though the sentence pronounced be inadequate, *some* sentence must always follow a conviction. For a court, as has sometimes been done, to omit to award a sentence for the expressed reason that the actual offence is shown to have been a very slight one, or that the criminality of the accused was greatly palliated by the circumstances of the case, or that he has been held for an unreasonably long period in arrest or confinement before trial, &c.,—is a marked irregularity.[3] And so of any mere direction as to the disposition of the accused, or recommendation as to his disposition addressed to the reviewing authority;[1] such not being a sentence or properly a substitute for one.

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[1] See, on this subject, McNaghten, 117–129, and Kennedy, 198–206, these two authors being especially full and pointed; also Simmons § 637–639; Griffiths, 81, 84; Hughes, 93; Bombay R., 35; O'Brien, 269; De Hart, 188–191; Lee, 155; Capt. Barron's Trial, (Navy,) 333; DIGEST, 696. Simmons § 639, cites a case of a member of a court-martial, who, having refused to vote a punishment after having voted to acquit, was himself brought to trial for the neglect of duty involved. It is now expressly provided by the English Rules of Procedure § 68, that—"*Every member of a court must give his opinion on every question which the court has to decide, and must give his opinion as to the sentence, notwithstanding that he has given his opinion in favor of acquittal.*"

[2] See McNaghten, 125; also G. C. M. O. 163, Dept. of the Mo., 1882; G. O. 58, (H. A.,) 1894.

[3] See G. O. 27 of 1835; Do. 12 of 1836; Do. 45 of 1864; G. C. M. O. 63 of 1874; Do. 8, Dept. of Cal., 1874; G. O. 20, Dept. of the South, 1866; Do. 69, Dept. of Dakota, 1870; Do. 41, Dept. of Arizona, 1886. In a recent case published in G. O. 58, (H. A.,) 1894, the court, in finding the accused "Guilty," add—"And in view of the circumstances of the case, the court does not consider punishment necessary." The General commanding the army, in disapproving this action, observes—"The accused being found guilty of the charge, it becomes the duty of the court to agree upon and award a sentence appropriate to the offense, leaving to the reviewing authority—upon a proper representation of the facts through a recommendation to clemency or otherwise—to take such action as may seem to him demanded in the interests of justice."

Where the accused has escaped. The fact that, pending the trial, the accused has escaped from military custody furnishes no ground for not proceeding to a finding, and, in the event of conviction, to a sentence, in his case; and the court may and should thus find and sentence precisely as in any other instance. The court, having once duly assumed jurisdiction of the offence and person, cannot, by any wrongful act of the accused, be ousted of its authority or discharged from its duty to proceed fully to try and determine, according to law and its oath.[2]

Where the accused is insane. Where indeed the evidence quite clearly shows that the accused was insane at the time of the offence, whether or not the insanity is specially pleaded as a defence, there can of course properly be *no conviction* and therefore *no sentence.* Where the fact is shown in evidence, or developed upon the trial, that the accused has become insane since the commission of the offence, here also the court will most properly neither find nor sentence, but will communicate officially to the convening authority the testimony or circumstances and its action thereon, and adjourn to await orders. In some instances of this class the court has added a recommendation that the accused be discharged from the service,[3] transcending however in so doing its strict province.

Compromise or Chance Sentence. For the court to make up its sentence by dividing the aggregate of the different quantities of punishment voted—as the terms of imprisonment, fines, or amounts of pay to be forfeited—by the number of the members, and taking the average result as the sentence to be adjudged, is clearly not a proper or military proceeding.[1] Twyford[2] expresses the opinion that such a sentence is "illegal" and "not the sentence of the court." More correctly, however, this form, though not affecting the validity of the judgment, would be an objectionable irregularity:[3] it is certainly very rare in practice. To determine upon a punishment by *casting lots* would be still more irregular.[4]

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[1] See *post* under head of—"The sentence must constitute a criminal judgment."

[2] Compare Meade *v.* Dpty. Marshal, 1 Brock, 324; Fight *v.* State, 7 Ohio, 180; McCorkle *v.* State, 14 Ind., 39; State *v.* Wamire, 16 Id., 357. Upon the trial by military commission of Dodd and others, in Indiana, in 1864, the court, in the absence of Dodd, who had escaped, sentenced him to death, and its action was duly approved by the reviewing authority. These authorities have been referred to in Chapter XIX on the point that the court may *find* under similar circumstances.

[3] See Chapter XIX—"Additions to the Finding, 6."

Adjournment and Reconsideration. In a case of importance, or where a conflict of opinion is developed upon a material question, it is always proper for the court to take an adjournment, pending its deliberation upon the sentence, in order that the members may have an opportunity to reflect upon the issues raised, consult precedents, &c., or in order that the judge advocate may be enabled to prepare an opinion or statement of the law upon the point under discussion.

So, too, after a sentence has been agreed upon, the court possesses the power to reconsider and modify the same at discretion, at any time before the transmittal of the proceedings to the reviewing officer. This doctrine was substantially affirmed at an early period, (1819,) in Private Williamson's case, where the action of a court-martial, which, having sentenced the accused to a term of confinement, adjourned and on the ensuing day reconsidered its sentence and substituted one of death, was held by Attorney General Wirt to have been authorized and regular.[5] And the power to reconsider would extend to the substitution, for the sentence, of a full *acquittal*, if deemed by the court just and proper.[1]

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[1] Compare Wharton, C. P. & P. § 842.

[2] Guide Book, p. 20.

[3] See Simmons § 642; Hough, (P.,) 793; Manual, 531.

[4] Compare Wharton, C. P. & P. § 842; 1 Bishop, C. P. § 998 *a*.

[5] 1 Opinions, 296–9. This authority, as indeed indicated by Mr. Wirt, is analogous to that which may be exercised by civil courts, of modifying sentences when not in accordance with law. Thus in Miller *v*. Finkle, 1 Park., 376, the court say:—"If, by inadvertence in pronouncing a sentence, a requirement of the statute has been overlooked, it may be corrected by the same tribunal before further action is taken. * * * The court has the right to expunge or vacate the first sentence and to pass a new sentence." And see 1 Bishop, C. P. § 1298 and cases cited. A court-martial, however, is not restricted to errors of law as grounds for reconsidering and modifying its sentence, but may change it for any other good reason—as that it is inadequate, or too severe, or inappropriate to the nature of the offence.

Entering up of Sentence. The sentence having been completed, the court may properly be reopened and the case then formally adjourned as tried: this reopening after sentence, however, is not necessary, and in the majority of cases is not resorted to. In either event, the sentence is given to the judge-advocate, (to whom, under Art. 84, it may be disclosed,) to be duly entered in the record for the action of the Reviewing Authority.[2]

II. CLASSIFICATION OF SENTENCES.

Distinction made by the Articles of War. The power of selection of punishment which a court-martial may exercise in imposing sentence depends upon the Article of war or other provision of law under which the charge is laid. It is now also further dependent upon the statute law and General Orders relating to *maximum punishments*, presently to be noted. The penal code of the army, in providing for the punishment of military offences, either prescribes a particular penalty to be adjudged in the event of conviction, or (subject to the G. O. aforesaid,) declares that a certain penalty shall be imposed *or such other* as the court may direct, or, without naming any penalty, simply leaves the matter of sentence to the will of the court. In the first case the sentence or punishment may be distinguished as *mandatory;* in the other two cases as *discretionary.*

Mandatory Sentences. The Articles of war which require that a certain specific punishment shall be imposed upon conviction are the 5th, 6th, 8th, 13th, 14th, 15th, 18th, 26th, 27th, 28th, 38th, 50th, 57th, 59th, 61st, 65th, 100th, and Sec. 1343, Rev. Sts. In imposing sentence for the offences made punishable under these Articles, the province of the court is simply ministerial—to pronounce the judgment of the law. It has no power to affix a punishment either more or less severe, or other, than that specified: any different or additional punishment is simply a nullity and inoperative.[1] If more penalties than one are prescribed for the offence by the statute, all are to be included in the sentence: if any one is omitted the sentence is illegal and of no effect.[2] Where there has been a conviction upon several charges setting forth different offences for which different mandatory punishments are provided, all must be embraced in the sentence. Where the conviction has been of offences for some one or more of which the punishment is mandatory, while for another or others it is discretionary, the mandatory punishment or punishments must certainly be affixed, no matter how widely or variously the court may further exercise its discretionary power of punishment in the same sentence. Indeed in all cases of punishments of the mandatory class, it is not the court which decrees the penalty but the statute; the distinctive function of the *court* practically terminating with the conviction.

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[1] That the same number of members need not take part in the reconsideration, provided a *quorum of the same* be present—see 7 Opins. of Attys. Gen., 338.

[2] In the British law, as lately as in the reign of James II, (see Art. 48 of his Code, in Appendix,) the presiding officer pronounced the sentence in open court,—as is still done in the French *conseils de guerre.*

Discretionary Sentences. The Articles of war which leave the punishment to the discretion of the court, are the 3d, 16th, 17th, 19th, 20th, 21st, 22d, 23d, 24th, 26th, 27th, 28th, 30th, 31st, 32d, 33d, 34th, 35th, 36th, 37th, 38th, 39th, 40th, 41st, 42d, 43d, 44th, 45th, 46th, 47th, 49th, 50th, 51st, 54th, 55th, 56th, 58th, 60th, 62d, 68th, 69th, 86th and 101st.

Extent of the Discretion—*Code of Maximum Punishments.* The wide discretion here conferred extends not only to all punishments authorized by military law and usage but also to the imposing of different punishments in the same sentence.[3] For a long period also no *maximum* limit was prescribed, and—except in Art. 58, where it is declared that the punishment shall not be less than that provided for the like offence by the law of the State, etc.—no *minimum.* At length, by an Act of Congress of September 27, 1890, enacted for the purpose of inducing something like uniformity in the penalties adjudged by courts-martial in similar cases, it was provided that whenever by the Articles of war the sentence is left to the discretion of the court, "*the punishment shall not, in time of peace, be in excess of a limit which the President may prescribe.*" Accordingly, a code of maximum punishments was prescribed by the President under this Act, *for cases of enlisted men*, which was published in G. O. 21 of February 27, 1891, since amended by G. O. 16 of 1895. This code must be carefully considered by courts-martial in imposing sentence in such cases. The statute of 1890 and the Order prescribing the limits of punishments are set forth in the Appendix.[1]

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[1] See DIGEST, 696; G. O. 13, Dept. of the Susquehanna, 1864; Do. 5, Fourth Mil. Dist., 1867. And compare Wharton, C. P. & P. § 752.

[2] As—in the civil practice—"if a statute imposes a fine *and* imprisonment, both must be inflicted." 1 Bishop, C. L. § 941.

[3] Our law, (long settled on this point—see O'Brien, 276,) differs from the British, where, as it appears, two distinct punishments cannot, except when expressly authorized, be combined in the same sentence. Simmons § 687; Kennedy, 209. And see Army Act § 44. In a recent American case in which dishonorable discharge, forfeiture of pay and confinement in a penitentiary were combined in a sentence imposed upon conviction of a violation of Art. 62, the regularity and validity of the sentence were expressly affirmed by the Supreme Court. *Ex parte* Mason, 105 U. S., 700.

This system of maximum punishments originated in an opinion, generally entertained in the army, that the punishments for *desertion* required to be adjusted and equalized. It was not originally contemplated that the scheme would be extended to other offences. In the opinion of the author, the present code, so far as it prescribes punishments for offences other than desertion, is artificial, complicated and embarassing in practice, and would preferably be amended and restricted to acts of desertion and a few other perhaps of the graver offences.

It has been ruled in regard to the maximum punishments thus prescribed that, if awarded at all, they must be awarded as fixed and in their entirety.[2] These punishments, it may be added, or lesser punishments of the same nature, are not necessarily adjudged where the case admits of some other penalty. Thus where there has been a conviction of two or more offences, for one of which the punishment is mandatory, the punishments for the others being discretionary, the sentence of the court will be legally sufficient if it contain no punishment other than the mandatory penalty or penalties.

It may be repeated that the law prescribing maximum punishments applies to enlisted men *only.* The discretion as to punishment with which general courts-martial are invested in cases of *officers* brought to trial before them, has been in no manner restricted otherwise than as defined in the Articles of war or by the usage of the service.

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[1] See Circ. No. 10, Department of Arizona, 1892.

[2] See Circ. No. 12, (H. A.,) 1892; G. C. M. O. 54 of 1892.

III. PRINCIPLES GOVERNING THE IMPOSING OF DISCRETIONARY SENTENCES.

The Sentence is to be based upon the Facts as Proved and Found. The sentence should follow the findings and be a judgment upon the facts as found. Thus, proof of valuable service, general good character, or other extraneous circumstances favorable to the accused but foreign to the merits of the case, (although sometimes properly considered upon the Finding as material especially to the question of *intent*,) cannot—*strictly*—be allowed to affect the discretion of the court in imposing sentence, but—if deemed to call for particular notice—should form the subject of a separate "recommendation" to clemency.[1] *In practice*, however, the fact that the accused is shown to have had a good character or record in the service prior to his offence is in general permitted to enter into the question of the punishment to be imposed, and a court-martial will sometimes add to a light sentence the explanation that it is "thus lenient" because of such character or record. Regularly, however, the same is rather ground for mitigation of punishment by the reviewing authority than for a milder judgment on the part of the court.[2]

Basing then the sentence upon the facts as established by the evidence and ascertained by the finding, the punishment will regularly and properly be measured by the nature and comparative gravity of the offence as illustrated by the peculiar circumstances preceding and accompanying it, the intent manifested by the offender, his *animus* toward the aggrieved person if any, the consequences of his act, its effect upon military discipline, &c.

Discrimination on Account of Relative Rank of Offenders. Where there are *joint* accused, different degrees of punishment will often properly be called for, according to the parts, whether leading or secondary, taken in the criminal transaction by the several individuals. Where a non-commissioned officer has been concerned with a private soldier in the offence, and is jointly charged and convicted with him, his sentence, for manifest reasons, should be more severe than that of his associate. So, the sentence of an officer or non-commissioned officer convicted *singly* of a military offence should in general be more severe than would be that of an inferior under the same or similar circumstances. It is however to be noted that a punishment which affects military *rank* is in general a severe one, and the more severe in proportion as the rank is the higher, so that reduction in the case of a non-commissioned officer, or suspension in that of a commissioned officer, will often prove a more rigorous penalty than would a considerable term of imprisonment in the case of an enlisted man. The rank and office of the accused will thus properly enter into the question of the proper measure of punishment to be apportioned.

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[1] See G. O. 20, Dept. of the South, 1866; Do. 115, Dept. of the Mo., 1867; Do. 15, 16, Dept. of Dakota, 1868; Do. 69, Id., 1870; G. C. M. O. 163, Dept. of the Mo., 1882. And compare Simmons § 697; Harcourt, 146, 150.

As heretofore pointed out, the sentence cannot of course be influenced by facts not in evidence and known only to individual members. G. O. 20, Dept. of the South, 1866; Do. 8, Dept. of Arizona, 1874.

[2] See, in G. O. 57, Dept. of Dakota, 1867, remarks of the Dept. Commander upon certain sentences as being so inadequate as in effect to extend clemency and invade the province of the reviewing authority.

Discrimination between Degrees of Criminality. In exercising its discretion as to the sentence, a court-martial will also properly discriminate between cases of persons tried and convicted by it, severally, of the same offence, where the degrees of criminality are shown to be materially different. In such cases the punishments should be different also, and to prescribe the same routine sentence in each instance is not a just or proper employment of the discretion devolved by the law.[1]

Discretion as affected by Jurisdictional Grade of Offence. The discretion of a *general* court-martial in adjudging sentence is not restricted by the fact that the offence of which the accused has been convicted is one cognizable by, and ordinarily referred to, a garrison or regimental court. While the punishment is not necessarily to be any the more severe because the case has been sent to a superior rather than to an inferior court,[2] it may yet properly exceed that which the latter could legally impose if the facts as proved are deemed to require it.[3]

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[1] Note remarks of Gen. McDowell in G. O. 18, Dept. of the South, 1873.

[2] Manual, 54.

[3] This simple point is noticed because of the erroneous view expressed thereon by De Hart, 53, 64-5.

As affected by a Finding of a "Lesser" Offence. Where a *lesser* offence has been found under the specific charge, the court cannot, of course, impose a punishment legal only for the offence actually charged;[1] nor can it properly impose one as severe as that offence would justly have called for had it been found.

Discretion as affected by the Local Law. Except in time of war, in a case of one of the crimes specified in Art. 58, the authority of a court-martial as to the awarding of punishment is not controlled by the local law. Where indeed the offence found is one which would also be punishable by the courts of the State, &c., in which it was committed, (or in which the trial is had,) the civil statute fixing the penalty may well be consulted as an aid in arriving at a reasonable measure of punishment for the military crime. The court-martial, however, is in no respect *bound* by that statute but may affix such sentence as the interests of military discipline, as prejudiced by the offence committed, may be deemed to require, though in so doing it very considerably exceed the limit of the local law.[2]

Restriction upon the Exercise of the Discretion. Wide as is the discretion as to the sentence which is reposed in a general court-martial by the 62d and the majority of the other Articles of war, the same is yet properly subject to such restrictions in regard to punishment as are prescribed by the Constitution, by the statute law governing the army, or by military usage.[3]

By Constitutional provision. The Constitution, in Art. VIII of the Amendments, provides that "excessive fines" shall not be "imposed, nor cruel and unusual punishments inflicted." This provision applies indeed only to the courts of the United States, but courts-martial, though, as we have seen, no part of the U. S. judiciary, and not legally *bound* by such provision, will properly observe it as a general rule of practice.

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[1] See G. O. 77 of 1837.

[2] See *Ex parte* Mason, 105 U. S., 700.

[3] See Simmons § 111; Kennedy, 208; Maltby, 100; De Hart, 68, 196; 10 Opins. At. Gen., 160.

"Excessive fines." Fines at military law are adjudged mainly with a view to reimburse the United States for some pecuniary loss occasioned by the offence of the accused: the idea of punishment, however, of course enters into every fine, and a fine reasonably increased for the purpose of punishment above the amount required to make good the loss would not be subject to objection. But a fine which should greatly exceed such amount, especially where the purposes of punishment were adequately answered by other penalties embraced in the same sentence, would be liable to the objection of being "excessive" in the sense of the Constitution.

"Cruel and unusual punishments." Here, the word "punishments," distinguished as it is from "fines," is regarded as referring mainly to such punishments as are corporal in their nature, namely such as impose restraint or suffering upon the body. As to the terms "cruel" and "unusual"—an *unusual* punishment may be said to be one not recognized by law or usage.[1] Punishments may be rare without being unusual. Thus confinement on bread and water diet, and ball and chain, though now unfrequently imposed, are not "unusual" since they are still sanctioned by usage and not prohibited by law. Whether a punishment is to be stigmatized as *cruel* depends so much upon the nature and circumstances of the offence that no general definition of the word as here employed can well be framed. A punishment may certainly be harsh and severe, and even in a degree unmerited,[2] without being cruel; and perhaps as satisfactory an explanation of the term as can readily be given would be a punishment which inflicted an amount of bodily (or mental) suffering or injury out of all reasonable proportion to the full demands of justice.[3] In prohibiting *cruel* punishments, the law doubtless had in view the punishments involving torture or needless agony which were practised under the old English law and were the occasion, at a later period, of legislation from which our constitutional provision was derived. This subject has recently been reviewed in the cases in which was considered the legality of the punishment of death as inflicted by the application of *electricity*—a method which, while "unusual," was held to be not "cruel."[1]

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[1] U. S. *v.* Collins, 2 Curtis, 194; Barker *v.* People, 20 Johns., 458; Done *v.* People, 5 Park., 364; 1 Bishop, C. L. § 947; De Hart, 68; Benét, 43; 10 Opins. At. Gen., 160.

[2] See 3 Opins. At. Gen., 632.

[3] See De Hart, 69; 10 Opins. At. Gen., 160; also instance referred to in DIGEST, 697, and case in G. C. M. O. 24 of 1873—where a term of solitary confinement in a "dark cell," imposed in a sentence with other penalties, was disapproved as likely to impair the health of the prisoner, and so "amenable to the objection of being cruel and unusual." And see People *v.* Norris, 80 Mich., 634.

By the statute law. The punishment selected must not be one either expressly or impliedly prohibited by the Articles of war or other statute. Thus Art. 96 expressly prohibits the imposition of the death penalty except in cases where the same is specifically authorized by the code. Art. 98 expressly prohibits the punishments of flogging, branding, &c. Art. 97, by a necessary implication from its terms, and similarly the recent Act of March 2, 1895, c. 189, prohibit confinement in the penitentiary for purely military offences. The limitations, declared by Art. 83, upon the power of *inferior courts* to inflict punishment, are familiar to the service.

By military usage. This is the limitation recognized in Art. 84, by which members of courts-martial are required, among other things, to swear that, in cases not determined by express provisions of the code, they will administer justice "according to the custom of war in like cases." A punishment, observes Atty. Gen. Bates, "contrary to the usage of the service would for that reason be forbidden by law."[2] This usage has sanctioned in practice two classes of punishments, *viz.* certain ones adopted from the common law, (or civil statute law,) as fine, imprisonment with or without hard labor, and disqualification to hold office, and certain others peculiar or nearly so to the military service, such as cashiering or dismissal, dishonorable discharge, suspension, loss of files, forfeiture of pay, reduction and reprimand. A punishment recognized by the laws of a foreign country as appropriate for military offences, such as the banishment recognized by the French law,[3] but which is unknown to the usage of our service, would be illegal here.[1] So of a punishment which, though once temporarily authorized by our own statute law, (no longer in force,) has never been recognized by our military custom—reduction of an officer to the ranks.[2] And so of a penalty, formerly not unfrequently resorted to, but quite discountenanced by the existing usage—the imposing of *military service or duty* as a punishment by sentence.[3]

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[1] People *v.* Durston, People *v.* Kemmler, 119 N. Y., 579, 586; *In re* Kemmler, 136 U. S., 447, (citing Wilkerson *v.* Utah, 99 U. S., 135-6.)

[2] 10 Opins., 161. And see 12 Id., 529; Bombay R., 36; Macomb, 61; De Hart, 196.

[3] Code de Justice Militaire § 185.

Par. 1019 of the Army Regulations, in specifying certain punishments,[4] (presently to be considered,) as legal for enlisted men, is but the expression of the usage or usages by which these punishments have been sanctioned. This paragraph, it may be remarked, is not viewed as necessarily restricting, at least in time of war, the punishments imposable upon soldiers to those designated;[5] others—hereafter to be mentioned—being also regarded as still authorized by the custom of the service and usage of war.

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[1] See an instance of this punishment in 3 Jour. Cong., 386. It has sometimes been adjudged by military commissions in time of war. See Part II.

[2] DIGEST, 653. And see *post*.

[3] "Military duty is honorable, and to impose it in any form as a *punishment* must tend to degrade it, to the prejudice of the best interests of the service." DIGEST, 698. This punishment—in the form of imposition of extra guard duty, extra drill, &c., or of an additional term of service, was declared by the Judge Advocate General, early in the late war, to be subject to grave objection, and his views were adopted by the Secretary of War and have been repeatedly followed in Orders. See G. O. 3, and G. C. M. O. 329, of 1864; Do. 7 of 1871; G. O. 17, Dept. of the Mo., 1861; Do. 8, Id., 1864; Do. 56, Army of the Potomac, 1862; Do. 3, Dept. of the N. West, 1864; Do. 49, Middle Dept., 1864; G. C. M. O. 26, *Navy* Dept., 1882. In a recent case, in G. C. M. O. 61, Dept. of Dakota, 1884, in which the court, in adjudging a period of confinement, added, as a further independent penalty, that the term of enlistment and service should be extended for a like period,—this part of the sentence is disapproved by Gen. Terry, who observes: "The term of enlistment in the United States army is fixed by law at five years, and there is no law which authorizes a court-martial to prolong that period of service. * * * The sentence of a court-martial which increases the term for which a soldier has enlisted is illegal." Par. 1020, A. R., now specifically forbids—"sentences imposing tours of guard duty," adding—"The performance of the honorable and important duty of guards should never be considered as punishment."

[4] The punishments recited are—death; confinement; confinement on bread and water diet; solitary confinement; hard labor; ball and chain, forfeiture of pay and allowances; dishonorable discharge from service, and reprimand, and, for non-commissioned officers, also reduction to the ranks.

[5] G. O. 9, Third Mil. Dist., 1867.

IV. PRINCIPLES GOVERNING THE FRAMING AND SUBSTANCE OF THE SENTENCE IN GENERAL.

The Sentence must constitute a Criminal Judgment. This principle results from the very nature of courts-martial as tribunals invested only with a *criminal* jurisdiction and power of punishment.[1]

In the first place, therefore, the requirement of the sentence must amount to a *punishment;* otherwise it is not only irregular but of no effect. Thus a sentence directing simply that the accused be "returned to duty" imposes no punishment, but the reverse, and is therefore no sentence in law.[2] And so of the form, adopted in one case, upon a conviction,[3]—"to be confined in a lunatic asylum;" such a confinement not being properly an imprisonment or a punishment at military law.

In the second place the sentence cannot assume to impose any form of *civil* liability, whether in the nature of debt or damages. It cannot appropriate or dispose of the *pay* of an accused or impose upon him a *fine*, to the use or for the benefit of any individual military or civil, but can forfeit or adjudge the same to the United States only.[4] Nor does the fact that the liability has grown out of a criminal transaction, as a liability for money or property stolen or fraudulently or otherwise illegally obtained by the accused, affect the application of the principle: in neither case can the court, by its sentence, require the accused to refund to the injured party or to reimburse him for his loss.[1]

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[1] See Chapter VI.

[2] See G. O. 47, Army of the Potomac, 1862; Do. 5, 20, Dept. of the the East, 1865; Do. 9, 53, Northern Dept., 1865; Do. 65, Dept. of Arkansas, 1865; Do. 5, Dept. of the Cumberland, 1866.

[3] In a case in G. O. 49, Dept. of the Susquehanna, 1864.

[4] G. O. 21 of 1851; Do. 2 of 1857; Do. 18 of 1859; G. C. M. O. 82, 478, of 1865; Do. 91, Dept. of Va., 1865; Do. 4, Dept. of Texas, 1865; Do. 33, Dept. of Ala., 1866; Do. 87, Dept. of the Mo., 1868; Do. 32, Fifth Mil. Dist., 1868; Do. 37, Dept. of Dakota, 1869; Do. 10, Dept. of the South, 1870; G. O. 33, Dept. of No. Ca., 1865; Do. 7, Dept. of the Tennessee, 1866; Do. 15, Dept. of the Miss., 1863; Harcourt, 173; DIGEST, 414, 418-9. And compare Warden *v.* Bailey, 4 Taunt., 78; O'Kelley *v.* Latham, Rowe, 462; Morris *v.* Whitehead, 65 No. Ca., 637.

Pay cannot now be forfeited by sentence in favor of a "company tailor" or "company shoemaker," to whom the accused may be indebted. (G. C. M. O. 30, Dept. of the Gulf, 1876.) Nor can it now be forfeited or stopped to satisfy the dues of a "laundress." Nor can it legally be forfeited to pay a "post trader" for articles previously sold by him to the soldier, or in favor of the *post exchange.*

Nor, further, can a court-martial, in imposing a pecuniary fine or forfeiture of pay, legally require, as has sometimes been done, that the amount shall be refunded to, or paid into, a particular fund—as a hospital or company fund,[2] or be expended for the use of sick soldiers, &c., or be allotted for the support of the family of the accused.[3] Nor can it, in forfeiting the pay of a soldier, on conviction of having stolen a sum of money from a disbursing officer, require that the amount of the forfeiture shall be credited to the account of said officer with the United States.[4] Further, a military court cannot condemn an accused to return a specific article of property to a person whom he has illegally deprived of the same; nor can it sentence him to be imprisoned until he pays a certain amount, or restores certain property, to a private individual.[5] Thus a court-martial, in framing its sentence, can recognize no liability or obligation on the part of the accused except to the United States.

The Sentence must not Trench upon the Province of

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[1] G. C. M. O. 177, 186, of 1864; Do. 478 of 1865; Do. 63 of 1868; Do. 33, Dept. of the East, 1866; G. O. 22, 26, Middle Dept., 1865; Do. 37, Dept. of Dakota, 1869; G. C. M. O. 22, Dept. of the Mo., 1883. And see G. C. M. O. 10, Dept. of the South, 1870, in which a direction in a sentence that a portion of the pay of the accused be appropriated to indemnify the owner of property *destroyed* by accused, was properly disapproved. Any appropriation of this class by a court-martial is in fact an assumption of *legislative* power.

[2] DIGEST. 418–19; G. C. M. O. 91, Dept. of Va., 1865; Circ. No. 9, (H. A.,) 1886. In G. O. 23, Dept. of Ala., 1866, a sentence imposing a fine, "to be appropriated to the use of the Freedmen's Bureau," was properly disapproved. In a case of a sentence, published in G. C. M. O. 217 of 1865, containing a forfeiture of the pay of a soldier, "to be appropriated for the benefit of the Soldiers' Home, if legal, and, if not, to be forfeited to the U. S. Government," it was properly directed by the reviewing authority that "the forfeiture of pay will be to the United States." It may be remarked that forfeitures, &c., of soldiers' pay, are appropriated for the benefit of the Soldiers' Home by operation of law, according to the provisions of Sec. 4818, Rev. Sts., and that any direction in a *sentence* in regard to such appropriation is unauthorized and surplusage.

[3] DIGEST, 418; G. O. 2, Middle Mil. Div., 1865.

[4] G. C. M. O. 7, Fourth Mil. Dist., 1868.

[5] G. O. 18 of 1859.

the Reviewing Authority. The court, in its sentence, may not assume a duty or power belonging to the reviewing officer or other commander. Thus, it should not attempt to execute its own sentence; as by adding to a sentence of dismissal of an officer—"and he is hereby dismissed accordingly,"[1] or, to a sentence imposing a fine, that the same be enforced in a particular mode or by a particular official.[2]

Nor, for the same reason, is it authorized to direct in a sentence—as one of forfeiture for example—that the offender be "released from arrest, and returned or restored to duty;"[3] nor can it direct the assignment or transfer of a convicted soldier to a particular regiment or organization;[4] or that a soldier, sentenced to be dishonorably discharged, be furnished transportation to his place of residence;[5] or that a soldier deemed insane be confined in an insane asylum.[6]

A court-martial, in awarding the *death* penalty, need not and should not designate in its sentence any time or place for its execution;[7] nor, in connection with a sentence of *imprisonment* in a military prison or penitentiary, should it direct that the same be executed at a certain prison or place specified:[8] these also are particulars properly to be determined by the reviewing officer.

Again, the court may not trench directly or indirectly upon the

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[1] James, 630, 660, 661; Simmons § 669; De Hart, 197.

[2] It would be especially irregular for a court-martial to direct a proceeding against a convicted party which it is for the *civil* authorities to initiate. Thus, in a case in G. O. 16, Mountain Dept., 1862, where, to a sentence imposed upon an officer for embezzlement, &c., it was added:—"And the court orders his property to be seized by the commanding officer of his post and held subject to future and legal disposition," this action was properly disapproved by the reviewing authority and the matter of the seizure "respectfully referred to the U. S. District Attorney for action."

[3] "This is transcending the province of a court-martial." G. O. 47, Army of the Potomac, 1862. And see G. O. 65, Dept. of Ark., 1865, and other Orders noted under head of—"The sentence must constitute a criminal judgment,"*ante.*

[4] G. C. M. O. 408 of 1864.

[5] G. O. 44, Dept, of the N. West, 1863.

[6] G. O. 49, Dept. of the Susquehanna, 1864, cited *ante.*

[7] DIGEST, 112; Tytler, 327; Griffiths, 87; De Hart, 196; also, as to the similar rule in civil cases, Com. *v.* Webster, 5 Cush., 407; 1 Bishop, C. L. § 951; 1 Id., C. P., § 1311.

[8] See G. O. 9, 16, Dept. of Ark., 1865; G. C. M. O. 12, 13, Dept. of the Col., 1882; Circ. 4, Dept. of Penna., 1865.

remitting or mitigating power of the commander. This is in fact done where the court—as has occurred in some instances—declares that, in view of the long confinement undergone by the accused while awaiting trial, or some other circumstance indicated, it awards no sentence.[1] So, it is done, though less directly, where the court, because of the previous good record of the accused, or other extenuating circumstance foreign to the merits, is induced to adjudge a mild sentence quite out of proportion to the gravity of the offence committed. Sentences of this kind indeed are not unfrequently resorted to, but, strictly, as indicated in a previous part of this Chapter, the court, in such cases, practically invades the province of the commander, whose function alone it is to determine whether, for any cause, the sentence shall be mitigated or remitted.[2]

Further, a court-martial has of course no power to exercise, by its sentence, any discipline or authority over the accused beyond the limits of his punishment, or over any other person within the command. Thus where to a sentence of reduction to the ranks it was added by the court that the accused be precluded from holding any position as a non-commissioned officer for six months, such addition was disapproved as unauthorized, since the court could not prevent the regimental commander from promoting the accused if thought expedient.[3] Similarly illegal was the action of a court, which, in imposing confinement and forfeiture, upon a conviction for drunkenness, added in the sentence that the sutler should be ordered not to sell the accused "anything on credit" thereafter.[1]

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[1] In G. C. M. O. 8, Dept. of Cal., 1874, in a case in which the court, in view of the long confinement of the accused prior to trial, concluded not to impose any punishment upon the conviction, the Dept. Commander, Gen. Schofield, remarked as follows:—"It is the duty of a court in all such cases to decide upon and award a sentence which shall be appropriate to the offence of which the prisoner shall have been convicted, and to leave to the Reviewing Authority—upon a proper representation of the facts through a recommendation to clemency or otherwise—to take such action as may seem to him demanded in the interests of justice." And see a similar case in G. O. 69, Dept. of Dakota, 1870.

[2] In G. C. M. O. 163, Dept. of the Mo., 1882, Gen. Pope, referring to the discretion of the court as to the awarding of sentence, says:—"It was never contemplated that the exercise of this discretion should usurp or encroach upon the pardoning power, residing only with the reviewing authority or the Chief Executive." And see Do. 8, Dept. of Cal., 1874; G. O. 57, Dept. of Dakota, 1867; Do. 20, Dept. of the South, 1866.

[3] G. O. 10, Dept. of N. Mexico, 1865.

It need scarcely be added that any direction in a sentence which transcends the authority of the court, and encroaches upon that of the reviewing officer, may be wholly *disregarded* by the latter in his action upon the case.[2] He will properly, however, expressly *disapprove* the objectionable portion.

The Sentence should be Consistent with the Finding. By this it is meant that the sentence must not impose a punishment not authorized by the finding. Thus, where there are several charges, and the accused is acquitted upon some and convicted upon others, the sentence must adjudge only such punishments as are authorized for the offences of which the accused is convicted; otherwise it will be inconsistent with the finding. So, where the finding upon a capital charge is Not Guilty but Guilty of conduct to the prejudice of good order and military discipline, a sentence of death will be inconsistent with the finding and therefore illegal.

It should be Definite and Unambiguous in Terms. Where the punishment is one made mandatory upon the court, there need be no question as to the form of expressing the sentence; it being proper and sufficient merely to specify the punishment by the word or words employed in the Article. Where the sentence is discretionary, the punishment or punishments selected by the court, (subject to the law of *maximum* punishments, in cases of enlisted men,) should be stated in simple, clear, and unmistakable terms, and with such precision in regard to details as to convey the exact particulars intended to be conveyed by the court.[3] Amounts of forfeitures and dues, numbers of files to be lost, and periods—years, months,[1] days,[2] &c.—of imprisonment, suspension, &c., should be defined explicitly and with certainty. Where—as is usual but not essential—the ***name*** of the accused is repeated in the sentence, it should be correctly given, and in such form that there will appear no material *variance* between the sentence and the finding or charge.[3]

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[1] G. O. 35, Army of the Potomac, 1862.

[2] G. O. 9, 16, Dept. of Ark., 1865.

[3] "A sentence, like any other writing, must, to be valid, be in such terms that its meaning can be understood. And always the court should take especial care to make it precise and accurate." 1 Bishop, C. P. § 1297. "The sentence must be definite, exact, and peremptory." Wharton, C. P. & P. § 923. "It should obviously be expressed in clear and unambiguous language." Simmons § 644. "So that the kind and degree of punishment shall be set forth definitely and precisely." De Hart, 196. A sentence of imprisonment that fails to fix the *term* is inoperative, and should be disapproved unless corrected on revision.

Further, where there are imposed two or more different punishments, the *order* of the execution of which will be material in affecting the status or rights of the accused, or the interests of the service or of discipline, the sentence should be so framed as to indicate clearly the order in which the punishments are intended by the court to be executed. Thus where a soldier is sentenced both to dishonorable discharge and a term of confinement, and it is proposed by the court that the former punishment shall be—as it is in general preferable that it should be—executed before the latter, the sentence should read that he be discharged and *then* confined, &c., or in terms to such effect.[4]

To be Entire and Single. In the absence of any statutory direction on the subject, usage has established that the sentence of a court-martial shall be, in every case, an *entirety;* that is to say that there shall be but a single sentence covering all the convictions on all the charges and specifications upon which the accused is found guilty, however separate and distinct may be the different offences found, and however different may be the punishments called for by the offences.[1]

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[1] In the absence of any specific provision on the subject in our law, the word "*month*" or "*months*," as employed in sentences, is treated as meaning precisely what it means in ordinary parlance, and is held to mean in the civil practice, viz. *calendar* month or months. See Moore *v.* Houston, 3 Sergt. & Rawle, 184; Brudenell *v.* Vaux, 2 Dallas, 302; Com. *v.* Chambre, 4 Id., 143; Sheets *v.* Selden, 2 Wallace, 178, 190. And note the Act of March 3, 1875, (applied to military cases by G. O. 64 of 1875,) in regard to credits for good conduct of five days "in each and every calendar month," &c.

[2] In a case in G. O. 64, Dept. of the Cumberland, 1868, a sentence "to stand on a barrel three hours each day," without adding the number of days, was properly held to be enforceable for one day only.

[3] See cases of variance inducing a disapproval of the proceedings, referred to in DIGEST, 743; also cases in G. O. 6, Dept. of La., 1868, where the Christian name of the accused was given as *James* in the specification and *John* in the sentence; and case in G. C. M. O. 117, Mil. Div. Pacific & Dept. of Cal., 1881, where the same appeared in the specification and finding as *James W. F.*, and in the sentence as *William H. F.* A mere difference however in a middle initial is held to constitute no variance. DIGEST, 743, and authorities cited in note; also Keene *v.* Meade, 3 Peters, 1; Gaines *v.* Stiles, 14 Peters, 322; Lessee of Dunn *v.* Gaines, 1 McLean, 321.

[4] Where this is not done, it is in general to be inferred, and in our present practice *is* inferred, that the punishment first mentioned is the one intended to be first executed. See DIGEST, 357.

Not to State the Vote, except in a case of Death Sentence. Although not required by law—by Art. 96 or otherwise—it is the uniform practice to add to a capital sentence that the same is concurred in by two-thirds of the court. But in no other case can the vote be stated in the sentence; nor can it be stated that the vote was unanimous, without a violation of the members' oath prescribed by Art. 84.[2]

Sentences to be Separate for Joint Accused. Where several persons are charged and tried together for the same offence or offences, and all, or more than one, are convicted, separate *entire* sentences should be adjudged to each, precisely as if they had been separately tried. Different punishments may, and, where the measures of their criminality are materially different, should, be imposed upon the several individuals; but, even though the same punishment be awarded to each, the sentences—like the findings—should be formally distinct.[3]

Cumulative Sentences, How to be Framed. Where a person, while under sentence of imprisonment, is again brought to trial and sentenced to a further measure of the same punishment, it is usual in the civil practice for the sentence to specify that the second imprisonment is to begin at the expiration of the first, indicating the date of such expiration.[4] At military law, however, it is not habitual, nor is it necessary, so to specify,[1] or otherwise to direct in terms that the second punishment, (of imprisonment, forfeiture, or suspension,) is to be executed as additional to or continuous upon the first. It is sufficient and almost invariable to frame such punishment in the usual form, as an independent sentence; the mere fact that a similar sentence is pending and being executed at the time determining of itself that the second sentence is to be treated not as concurrent but as a distinct additional penalty of which the execution is to commence upon the completion of the first, *i. e.* when the same is terminated by its due expiration, or by a remission on the part of the proper superior authority. The second sentence is thus made cumulative simply by operation of law.[2]

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[1] As to the civil practice, see Wharton, C. P. & P. § 910, 911; 1 Bishop, C. P. § 1325-1334.

[2] See similarly as to the statement of the Finding, in Chapter XIX.

[3] Where there are joint defendants, the sentence should be "in form several, not joint." 1 Bishop, C. P. § 1035. And see Wharton, C. P. & P. § 312, 314; U. S. *v.* Ismenard, 1 Cranch C., 150; Simmons § 644. A joint sentence, where all are alike convicted of the same offence or offences, would indeed be *legal* and operative at military law, though irregular and exceptional as to form.

[4] See Wharton, C. P. & P. § 932; 1 Bishop, C. L. § 953.

It may be added that a punishment, to be cumulative, must be one capable of being independently executed. Where a court-martial has imposed upon an accused a penalty which, from its nature, cannot be executed more than once, as dishonorable discharge or forfeiture of all pay, and such penalty has been approved and has taken effect, it will be futile and superfluous to repeat it in framing a subsequent sentence. In such a case, the court will, in the first instance, have exhausted its power over the subject, so far as concerns the particular penalty.[3]

The Sentence should not embrace Penalties resulting by Operation of Law. Thus the sentence of a deserter need not and should not contain a direction to the effect that he make good the time lost by his unauthorized absence,[4] or that he incur the forfeitures specified in the Army Regulations,[5] or that he be subjected to the loss of civil rights prescribed by the statute law;[1]—the same being all penal consequences attaching upon the (approved) conviction, independently of the sentence. So, in convicting an officer under Art. 6 or Art. 14, (providing for the punishment of false musters, &c.,) it is not essential to add, in connection with the dismissal to be adjudged, that the accused be disabled from holding office or employment in the public service, since this disability must necessarily result from the judgment of the court.

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[1] Recent instances in which it was done in the sentence are found in G. C. M. O. 24, 39, Dept. of Cal., 1885.

[2] DIGEST, 444, 698. The legal effect will be the same where the soldier has been twice successively tried, and has received at each trial a term or quantity of the same punishment, but the first sentence has not been promulgated as approved, or has not commenced to be executed, at the date of the second sentence. Here the second sentence, when approved, will be cumulative upon the first. See par. 1029, Army Regs., containing ruling of the Sec. of War in concurrence with a previous opinion of the Judge Advocate General.

[3] See case in G. O. 10, Dept. of W. Va., 1862.

[4] G. O. 94, Dept. of the Mo., 1867; Do. 21, Dept. of the Lakes, 1873; G. C. M. O. 74, Dept. of the East, 1873; DIGEST, 42. It was formerly held *contra*. G. O. 45 of 1843.

[5] DIGEST, 416–17; U. S. *v.* Landers, 92 U. S., 79. The special regulations referred to are pars. 128 and 1514.

V. THE SPECIFIC PUNISHMENTS SEPARATELY CONSIDERED.

These will be presented in the following order:—I. Punishments legal and appropriate for officers: II. Punishments legal and appropriate for both officers and enlisted men: III. Punishments legal and appropriate for enlisted men only.

I. Punishments Legal and Appropriate for Officers.

These are Dismissal or Cashiering, Disqualification for office, Suspension, Loss of relative rank or files, Reprimand or Admonition, and Apology.

Dismissal or Cashiering. Dismissal and cashiering[2] were formerly regarded as quite distinct in military law; the latter involving, in addition to a dishonorable separation from the service, a disability to hold military office and thus constituting a more severe punishment than the former.[3] The two are now classified as separate punishments in the British Army Act,[4] but in our law and practice all such distinction has long ceased to exist, cashiering having become identical with dismissal.[1] In all the present Articles of war in which this punishment is named except two—the 8th and 50th—"dismissed" is the word adopted, and in those "cashiered" was retained apparently through inadvertence. In sentences of courts-martial, as also in the common military parlance, "cashiering" or "cashiered" is now most rarely used, and "*dismissal*" will therefore be here exclusively employed in treating of this punishment.

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[1] By Secs. 1996, 1998, Rev. Sts.

[2] From the French *casser*, to break.

[3] McNaghten, 12–16; Hough, 123–130; Maltby, 89, 92; O'Brien, 274–5; 2 Opins. At. Gen., 289; DIGEST, 214; G. O. 17, Dept. of Fla., 1866. Note also case in James, 377, and Simmons § 116, in which a sentence of cashiering was *mitigated* to dismissal.

A form of this punishment in Arts. 9 and 10, (Sec. I,) of Charles I, is—to be "cashiered the army without pay or passport." In Art. 165 of the Code of Gustavus Adolphus is a peculiar provision, that a "superior officer" who "shall *sollicite* for any man that is lawfully convicted" by a court-martial, "unless it be for his very neere kinsman for whom nature compels him to intercede, * * * shall be held as odious as the delinquent and *cashiered from his charge.*"

[4] Sec. 44. "Cashiering renders a person unfit to serve her Majesty again in any capacity." Story, 95.

Dismissal by sentence, it need hardly be observed, is simply an expulsion of the officer from the military service, carrying with it *no legal disability.*[2] A dismissed officer is not as such disqualified to hold either military[3] or civil office: disqualification for office is, in our military law, as will hereafter be noticed, a separate and distinct punishment.

Dismissal, to the exclusion of any other punishment, is *required*, by Arts. 5, 6, 8, 13, 15, 18, 26, 27, 28, 38, 50, 59, 61 and 65, to be adjudged upon conviction of the offences in these Articles specified. It is also *legally imposable* upon conviction of any offences of which the punishment is made discretionary with the court, and may therefore be adjudged under any of the Articles, other than those last named, which relate to the offences of officers—except only Art. 57 which enjoins, exclusively, the death penalty.

Form of the sentence. The proper *form* of the sentence is—"to be dismissed," or "to be dismissed the service," or "to be dismissed the service (or 'military service') of the United States." The term "dishonorably," though sometimes employed, need not be expressed, the notion of dishonor being necessarily involved in a dismissal by sentence. Nor, as it has already been noticed, is it proper to add—"and he is hereby dismissed accordingly," since it is not the sentence that dismisses or can dismiss the officer, but its approval or confirmation by the reviewing authority.[1]

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[1] De Hart, 194; Benét, 44; G. C. M. O. 103 of 1875; DIGEST, 214, 355-6.

[2] It entails merely, where adjudged on conviction of cowardice or fraud, and after the sentence has been published as indicated in Art. 100, the loss of the privilege of associating with officers of the army.

[3] If reappointed and confirmed by the Senate. (Sec. 1228, Rev. Sts.) It is otherwise as to *naval* officers, who, when dismissed by court-martial, cannot again re-enter the navy as officers. (Sec. 1441, R. S.)

When the dismissal is "for cowardice or fraud,"—as where it is adjudged on conviction of misbehaviour before the enemy in violation of Art. 42, or of some offence to the fraud of the United States, as presenting a fraudulent claim or embezzlement, in violation of Art. 60,—the sentence should "further direct" in regard to the publication of the crime, punishment, &c., as is prescribed in the 100th Article.

Execution of this punishment. This punishment is executed, by operation of law, immediately *upon approval or confirmation, and notice* to the officer. Upon the day of the official announcement to an officer of the approval or confirmation by the proper authority of a sentence dismissing him from the military service, his connection with the army at once ceases and he becomes a *civilian.* In some instances the day of actual notice will be the same as that of the final action giving effect to the sentence. In other cases, however, a certain period will elapse after the date of the confirmation and its promulgation in General Orders before the officer can be officially informed of the same. In such cases, the general rule is that the sentence shall be considered as taking effect on the day on which the Order, in and by which the sentence is thus confirmed, is received by him, by official mail or telegram, or is promulgated at the post or station at which he is serving or held in arrest.[2] All military persons are in general bound to take notice of General Orders officially promulgated at their stations;[3] and, in the absence of evidence to the contrary, an officer will be presumed to have been informed of an Order, confirming a sentence dismissing him from the service, on the day on which the same was published or received, at his post or station.[1] It may happen, however—and this especially in time of war—that, on the day of promulgation or receipt, the officer may be involuntarily absent so that he cannot in fact take notice of the Order. Thus he may be absent on some duty upon which, (irregularly or because of some emergency,) he has been ordered, or he may be absent sick in a distant hospital, or may be a prisoner in the hands of the enemy. In cases of this character, proof of the fact of absence will rebut the presumption indicated, and the officer will, properly, not be charged with notice of the confirmation of the sentence, nor will his dismissal take effect, until *actual* official notice of the same as confirmed is given to him.[2]

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[1] Postponing, by sentence, a dismissal till after the execution of another punishment imposed by the same sentence, is a proceeding unknown in our military service, but seems to be sometimes resorted to in the *naval* practice. Thus, in G. C. M. O. 27, Navy Department, 1887, an officer, convicted of fraud, embezzlement, desertion and other offences, is sentenced to imprisonment for three years and *to be dismissed at the end of that term.* This sentence is duly approved and confirmed.

[2] See the general rule as stated in G. O of Jan. 14, 1831, and Do. 103 of 1864, and illustrated in G. C. M. O. 20 of 1874; Do. 42 of 1879; DIGEST, 366, 545.

[3] See G. O. 2, Dept. of Va. & No. Ca., 1865; O'Brien, 85.

The phrase, sometimes added to the official approval of a dismissal, as published in General Orders, that the party "ceases to be an officer of the army from the date of this order," is surplusage, being no proper part of the action required, and of no legal effect in fixing the date on which the dismissal goes into operation. The dismissal does or does not take effect at the date of the order, according as the officer may or not receive official *notice* of the same on its date.

It need hardly be added that, even where a considerable delay has, without fault of the reviewing officer, occurred in acting upon a sentence of dismissal, the same cannot legally be made, by the order of that officer, to take effect as of a date *prior* to that of his final action,—as of the date, for example, of the actual adjudging of the sentence by the court.

Dismissal with ignominy. In time of war, courts-martial have sometimes directed in sentences of dismissal that the same be accompanied by certain minor penalties impressing the dismissal with an ignominious character—such as taking away or breaking the sword of the officer, or cutting off his shoulder straps or other *insignia* of rank, publicly in presence of the command to which he is attached.[1] In a few cases, upon conviction of misbehaviour before the enemy, it has been directed in the sentence that the officer be paraded in front of the command bearing a placard inscribed with the word "coward,"[2] and further even that he be drummed out of the service.[3]

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[1] DIGEST, 545; O'Brien, 85.

[2] DIGEST, 545. And compare Simmons § 788; also Allstaedt *v.* U. S., 3 Ct. Cl., 290, where an executive order of dismissal was held to have taken effect, not at its date, but at the subsequent date of its receipt by the officer at his station. So, in Gould *v.* U. S., 19 Ct. Cl., 593, in a case of an officer of volunteers mustered out and discharged during the late war, but who did not receive notice of such action till at the end of three months, it was held that his discharge did not take effect till the notice reached him. Note also the similar principle incorporated in the 49th Art. of war, and recognized in Mimmack *v.* U. S., 97 U. S., 426, Barger *v.* U. S., 6 Ct. Cl., 35; G. O. 103 of 1864, —that an officer's *resignation* takes effect not at the date of the order accepting, but at the date on which he is officially notified of such order. Compare also G. O. 80 of 1880.

Such additional penalties are commonly executed through the officer of the day or adjutant, after the reading of the order promulgating the approval of the dismissal, at a parade or on some other occasion of the formal assembling of the command.[4]

Disqualification for Office. This punishment, though formerly, by a provision of the British Mutiny Act, specifically legalized in cases of embezzlement and some offences of a similar nature, ceased subsequently to be thus authorized,[1] and is not included in the list of legal punishments contained in the present Army Act.[2] In the American *civil* courts, disqualification to hold office seems to have been recognized as a common-law punishment for treason,[3] but does not appear to have been employed in other cases except where expressly authorized by statute.[4] In sundry U. S. statutes,[5] disqualification or ineligibility for office has been imposed not as a punishment but as a legal consequence upon removal from office or conviction of crime in cases of civil officials.

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[1] See cases in G. C. M. O. 61, 117, 285, 315, 332, of 1865; G. O. 25, Mountain Dept., 1862; Do. 9, Dept. of the Cumberland, 1862; Do. 55, 60, Army of the Potomac, 1863; Do. 19, 27, Id., 1864; G. C. M. O. 16, Id., 1865; G. O. 3, Dept. of W. Va., 1863; Do. 73. Dept. of Va. & No. Ca., 1864; Do. 29, Dept. of the Gulf, 1864; Do. 43, Dept. of La., 1865; Do. 8, Dept. & Army of the Tenn., 1865, G. C. M. O. 19, Dept. of Ky., 1865. In an old Order—G. O., Seventh Mil. Dist., Jan. 22, 1815, the form is—"to have his sword broke over his head." And see sentence of Capt. Manning, *post*. Punishments of this class are more common in foreign armies. In a late case in France, that of Captain Albert Dreyfus, an artillery afficer on duty at the Ministry of War, convicted of disclosing State secrets to the German government, the sentence was—Imprisonment for life in a fortress and degradation from all military rank and honors. In the execution of this punishment the name of the accused was struck from the army rolls, and, in the presence of the garrison of Paris, his sword was broken and his buttons and military insignia were stripped from his uniform, and thus degraded he was marched along the four sides of the square in which the troops were formed. (January, 1895.)

[2] G. C. M. O. 332 of 1865; G. O, 19, 27, Army of the Potomac, 1864; Do. 73, Dept. of Va. & No. Ca., 1864.

[3] G. O. 73, Dept. of Va. & No. Ca., 1864. In a case in G. O. 9, Dept. of the Cumberland, 1862, it was directed in the sentence that the officer, after being publicly stripped of his *insignia* of rank, be "conducted by the guard without the lines of the command." In an Order of the Revolutionary period—G. O., Hdqrs., Valley Forge, March 14, 1778—the Commander-in-Chief, (Washington,) approves a sentence of a Lieutenant—"to be dismissed with infamy," and orders him "to be drummed out of camp to-morrow morning, by all the drums and fifes in the Army, never to return."

[4] See Order last cited; also G. O. 25, Mountain Dept., 1862.

In our military code, disqualification, (except as it may, at an early period have been involved in cashiering,) has never been specifically authorized as a distinct punishment, though in some of the Articles—the present 6th and 14th for example—it has been attached as a legal consequence to the sentence of dismissal. The authority therefore for disqualification as a military punishment by sentence must rest upon *usage.*

In a case of a contractor tried in 1865 by a naval court-martial,

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[1] Simmons § 668. The first instance of a sentence of disqualification that I have met with in American history was that adjudged Capt. Manning, British Army, tried for surrendering New York to the Dutch in 1673, and sentenced to have his "sword broke over his head in public before the City Hall, and himself rendered incapable of wearing a sword and of serving his Majesty for the future, in any public trust in the government." Barber, Hist. Col., New York, 19–20.

[2] Sec. 44.

[3] Barker *v.* People, 20 Johns., 451.

[4] Com. *v.* Jones, 10 Bush, 725, Brackett *v.* McCarty, Id., 758.

[5] Revised Statutes, Secs. 243, 1229, 1441, 1734, 1781, 1782, 1788, 1789, 2105, 2233, 2873, 3167. 3890, 4187, 4188, 4373, 4374, 5332, 5334, 5392, 5408, 5449, 5499, 5502, 5508, 5532. The disabilities attached by Secs. 1996–1998 to convictions for *desertion* have been elsewhere remarked upon.

In an early case mentioned in 2 Journals, 204, (1777,) Congress, in summarily dismissing 12 Lieutenants of the Navy, rendered them at the same time "incapable of holding any commission or warrant under the authority of the United States."

This punishment was once not unfrequently resorted to by *militia* courts-martial in New England. See Militia Reporter, 145; Printed Trials of Maj. Gen. Goodale, and Capt. S. Watson, *et al;* Resolve of Mass. Legislature, of March 10, 1808, in regard to cases of Col. Robt. Gardner and Majors Benj. Harris and Amasa Stetson.

(under the Act of July 17, 1862, s. 16,) and sentenced to be excluded from thereafter contracting for naval supplies, the Attorney General, in pronouncing against the legality of this sentence, observes generally:—"A sentence of incapacity or disability does not seem to fall within the range of discretionary punishments allowable by the usage of the service."[1] As a general proposition, however, this statement of the law is too broad.[2] In a previous General Order of the Navy Department,[3] disqualification for office under the United States had been expressly recognized as an authorized punishment for naval courts-martial, and in the *army* a long series of precedents had given sanction to this form of penalty. Prior to the late war, indeed, this punishment, though from time to time imposed, was not a common one.[4] From an early date, however, in the war it was frequently resorted to, and, including the period from that date to March, 1870, (in which month it was imposed and approved in two instances,) the author has noted some one hundred and twelve cases published in Orders, in which this penalty was adjudged by court-martial in connection with dismissal;[5]—the disqualification pronounced being in most cases *general*, *i. e.* not confined to the holding of

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[1] 12 Opins., 528. (1868.)

[2] Had the ruling been confined to the sentence in the particular case it would scarcely have been subject to exception. Later indeed the Attorney General appears to recognize disqualification as a not illegal punishment for an *officer of the army*, in Gen. Porter's case, where he refers to it as "a continuing punishment," which may be at any time "remitted by the exercise of the pardoning power." 17 Opins., 303. See note 5, *post.*

[3] G. O. 44 of 1864.

[4] Instances are found in G. O. of April 2, 1818; Do. of Sept. 25, 1819; Do. 71 of 1829; Do. 15 of 1860.

[5] See the numerous cases collected in the author's note to DIGEST, 375–6. Those published, and approved in the Orders cited of the War Dept., included such leading cases as those of Maj. Gen. Porter, Brig. Gens. Hammond and Briscoe, B. G. Harris, M. C., &c. In the case of the former, the disqualification imposed—"to be forever disqualified from holding any office of trust or profit under the Government of the United States"—was further recognized as legal by being expressly *remitted*, as a continuing punishment, by the President in 1882.

It may be added that disqualification could rarely be an appropriate punishment for an *enlisted man*. In one instance, in G. C. M. O. 98 of 1867, in which a soldier was sentenced, with confinement, "to be forever disqualified from holding any office above the rank of private in the U. S. army," this part of the sentence was very properly disapproved.

military office merely, but extending to the holding of *any* office under the United States.

In a case, however, published in a General Order of April, 1870,[1] the punishment of disqualification, (included by the court in its sentence,) was disapproved as "unauthorized by law;" and the same action was repeated in a case of a similar sentence in December following.[2] Since the last date the punishment under consideration is not found to have been embraced in any sentence published in General Orders.

The disapproval in these cases is understood to have been induced by the ruling of the Attorney General above cited. But this ruling, as has been seen, was not properly applicable at least to sentences of disqualification in the army, and so far as usage and the practice of the Government could sustain such sentences, the same must be regarded as having been fully and amply sanctioned in our law.

But while this punishment has thus been sanctioned, and is one which might profitably be resorted to in aggravated cases of embezzlement, gross malfeasance in office, or other extreme offence exhibiting the offender to be quite unworthy to serve the United States at least in a military capacity, it is yet to be observed that the same, even though it were confined to military office only, would always remain objectionable as practically amounting to an inhibition for an indefinite period upon the constitutional appointing power of the Executive in the case of the officer, and thus constituting an exercise of authority apparently beyond the province of a court-martial. Were the disqualification limited to a certain term of years, as in some militia cases,[3] and the approval of the President required, as in cases of dismissal, to give the punishment legal effect, the objection indicated would be mainly done away with.

Execution. This punishment would be executed in the same manner as dismissal, *i. e.* upon *official notice* of the approval of the sentence by the President or proper Commander, as given either by the formal order of promulgation of the proceedings, or otherwise. Upon the date of such notice the disqualification is complete, and thenceforward continues to be in force till removed by the pardoning power.[1]

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[1] G. C. M. O. 22, H. Q. A.

[2] G. C. M. O. 57, Id.

[3] See Militia Reporter, 145; Printed Trial of Maj. Gen. Goodale, (Mass. militia;) Printed Trial of Capt. S. Watson, *et. al.* (Id.)

Suspension. This punishment, (no longer authorized by the British code,[2]) is imposable in our service for any offence of an officer[3] of which the penalty is discretionary with the court. Though *recognized* in one of its forms—suspension from command—by the 101st Article of war,[4] it in fact rests for its authority upon *usage*. It may be imposed for any stated term of months or years; and has in fact been adjudged in one instance for so short a period as fifteen days,[5] and in another for so long a period as twelve years.[6]

Kinds of suspension. There are properly but two kinds of suspension of commissioned officers—suspension from rank and suspension from command. The former indeed includes the latter; that is to say, a suspension of an officer from rank includes a suspension from such right of command, (and exercise of authority and performance of duty incident thereto,) as may be attached to his rank. "Suspension from the service" is a form which was once sometimes employed as substantially equivalent to suspension from rank but is now disused. "Suspension from duty" is a form more frequently resorted to in the Navy[7] than in the military practice.[1] The "*suspension from pay*" indicated in Art. 101 is not properly suspension in the legal sense, but forfeiture. The pay for the term is not merely *withheld*—the right to receive it is not merely suspended or placed in abeyance—but the same is absolutely forfeited precisely as in any case of a forfeiture expressed as such in the sentence.[2] In suspending, however, an officer from command, a court-martial, in view of the provision of the Article, is not, as it is held, empowered to suspend, (*i. e.* forfeit,) his pay for a period longer than the term of suspension from command.[3]

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[1] See 17 Opins. At. Gen., 303, cited *ante*.

[2] See Army Act, s. 44.

[3] Suspension from rank (and pay) of *non-commissioned officers* was at one time known to the British practice, (Simmons § 126; McNaghten, 35-37,) but is no longer authorized. (Army Act § 44.) In a few rare instances in our service, of which the latest known is a case in G. C. M. O. 33, Dept. of the East, 1872, non-commissioned officers have been sentenced to suspension, but such punishment has no sanction in usage, and is not recognized in the Army Regulations, par. 1019.

[4] As also in Sec. 1326, Rev. Sts., relating to cadets of the Military Academy.

[5] G. O. 61, Dept. of the East, 1865.

[6] G. C. M. O. 19, (H. A.,) 1885.

[7] See Naval Regulations, Art. 32, s. 2; Harwood, 134-5; G. C. M. O. 28, Navy Dept., 1890. The following are some of the more recent instances of sentences of suspension, combined with loss of pay in the Navy:—"To be suspended from rank and duty on furlough pay," for a designated number of years or months. G. C. M. O. 8, 23, 24, of 1886; Do. 12 of 1887; Do. 20, 48, of 1888; Do. 54, 82, of 1892. To be so

Suspension from rank. This punishment involves a deprivation, during the period of the operation of the sentence, not only of the right of command but of all other rights and privileges incident to the rank, as such, of the officer, whether held in his relation to other officers or to enlisted men. Thus it deprives him of any right of promotion accruing during the term of suspension to which he would have been entitled had he not been suspended, and causes the same to accrue to the officer next junior.[4] It renders him ineligible to sit upon a court-martial, court of inquiry, or military board, and also divests him of the right of priority and precedence in the exercise of the minor privileges of the officer, such as the privilege of the selection of quarters whenever quarters become available for selection pending the term of suspension. And so of any other right or privilege of

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suspended "on waiting orders pay." G. C. M. O. 67 of 1892. To be so suspended "on half of shore duty pay." G C. M. O. 36 of 1892. Also —"on half of leave or waiting orders pay." G. C. M. O. 39 of 1892. Also—"on two-thirds of waiting orders pay." G. C. M. O. 41 of 1892.

[1] It appears in Gen. Swaim's case, in G. C. M. O. 19 of 1885. In the recent case of Major Wham, (G. O. 20 of 1895,) the sentence of dismissal is committed to "suspension, on half pay, from rank, duty and all privileges" until a certain date named

[2] 18 Opins. At. Gen., 120.

[3] It was originally so held, in a case arising under a corresponding naval article, in 4 Opins. At. Gen., 324.

[4] McNaghten, 21; O'Brien, 275; G. O. of Jan 23, 1811. It is a frequent form of suspension in the Navy, (intended to prevent this consequence,) to add to the suspension—"and to retain," or "retaining" his present number in his grade, or on the list of officers of his rank, during the period of the suspension. See G. C. M. O. 2, Navy Department, 1887; Do. 28, 29, Id., 1890, Do. 28, Id., 1891; Do. 36, 41, 75, Id., 1892.

priority, obedience, or deference, which would otherwise have been due to his rank; the same, with its incidents, remaining, during the term of the suspension, dormant and inoperative.

But rights incident to his *office*, independently of rank, he may still enjoy. Thus his right to rise relatively or in files in his grade, (where a senior dies, resigns, or is dismissed, retired, or promoted,) is not affected by the suspension, this being a right incident to his *office*, according to the date of his commission. So, he may continue to occupy quarters occupied by him at the date of the sentence,[1] (where no new selection of quarters involving him is required at his station,[2]) to purchase fuel, commissary stores, &c., from the proper officer, to draw his pay,[3] (where the same is not expressly forfeited in the sentence according to Art. 101,) to receive his pecuniary or other allowances, &c.[4]

Suspension from command. This punishment merely deprives the officer of authority to exercise his proper military command, (devolving it upon his junior or some other officer specially assigned to the same,) and consequently of his right to give orders to, or exact obedience from, his inferiors, to convene the courts and boards which he would be empowered to convene by virtue of his command were he not suspended, to sign muster-rolls, reports, discharges, &c., as commanding officer, to appoint or reduce non-commissioned officers, to grant furloughs, make arrests, &c. It does not affect his right of promotion, or any military rights or privileges incident to rank or office, or other than those attaching simply to command as such. It is thus not in general an appropriate punishment for a staff officer.[5] It is also evidently a considerably less severe punishment than suspension from rank.

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[1] Unless his station be changed. Circ. No. 1, (H. A.,) 1892.

[2] Where the quarters occupied by an officer under suspension from rank are selected by a senior, he must ordinarily take such quarters as may be assigned him by the proper commander. See DIGEST, 730.

[3] 4 Opins. At. Gen., 444; 6 Id., 203; DIGEST, 731.

[4] McNaghten, 27; DIGEST, 731. Unless absent on leave. See Circ. No. 5, (H. A.,) 1886; Do. No. 3, (Id.,) 1888. But it is held by the Court of Claims in Gen. Swaim's case, (28 Ct. Cl., 173,) that an officer sentenced to suspension from rank *and duty* for twelve years, with forfeiture of one-half his monthly pay for the same period, was not entitled to *allowances*.

[5] If adjudged such an officer, the suspension will properly be—"*from rank and duty*," as in Gen. Swaim's case, *ante*.

Suspension in general. Suspension—it may be added—is not dismissal nor any degree of dismissal. It does not divest the officer of his office or commission, but only holds in abeyance the rights and functions attached to his rank or command.[1] Though pending the term of suspension he is not in a legal capacity to receive or execute orders pertaining to his military specialty, he yet remains subject to such orders as may properly be given him in his official or personal character, irrespective of rank or command,[2] as well as amenable to the jurisdiction of a court-martial for any military offence committed during such term.[3] The term being completed, he reverts to his former rank,[4] as well as to his former command if not meanwhile legally divested by superior authority. In the interim, however—the punishment being a continuing one[5]—he may be restored by the pardoning power, and his promotion by the appointing power will operate as a pardon and terminate the suspension.[6] So the ordering of him by competent authority, (the officer who approved the sentence, his successor in command, or his authorized superior,) to resume command or to perform a duty incompatible with the terms of his suspension—as might be done in an emergency, as in battle—will properly operate as a constructive pardon and relieve him from further punishment.[1]

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[1] "Suspension from rank, though it has the effect of depriving an officer for the time of his rank, and putting a stop to the ordinary discharge of his military duties, does not void his commission, annihilate his military character, or dissolve that connection which subsists between him and the sovereign." Tytler, 126. And see Id., 316. "It may be considered as borrowed from the ecclesiastical jurisdiction which admitted suspension as a minor excommunication." Sullivan, 88. "Suspension is not expulsion; and the officer, although suspended, remains, in legal contemplation, on the establishment, although his capacities for service are for the time gone." 5 Opins. At. Gen., 740. And see 6 Id., 715; Hough, (P.) 710; McNaghten, 20–21; Maltby, 33; De Hart, 56.

[2] Thus an officer under suspension may be ordered to change his station. So, he may be required to attend a court-martial as a witness. 6 Opins. At. Gen., 714. In neither case is the status of suspension affected.

[3] "An officer, though under suspension, does not cease to be an officer subject to the military law and, in all things lawful, subject also to the order of the President." 6 Opins. At. Gen., 715. And see Sullivan, 88; Tytler, 126–7; Hough, (P.) 710; McNaghten, 26; De Hart, 56; DIGEST, 729; also case, in G. C. M. O. 12 of 1878, of an officer tried for and convicted of drunkenness while under a previous sentence of suspension. The suspended officer would indeed be liable to trial and punishment if he wilfully assumed to exercise any of the rights or functions of which his sentence of suspension had divested him.

[4] "At the expiration of the term of suspension he becomes a perfect man again." Sullivan, 88. And see McNaghten, 27.

[5] See 17 Opins. At. Gen., 31.

[6] 4 Opins. At. Gen., 8.

Suspension, also, is not *arrest*, and does not, *per se*, authorize a commander to subject the officer to bodily restraint.[2] Courts-martial indeed sometimes add to a sentence of suspension that the officer shall remain confined to the limits of his post or station pending the period for which he is suspended.[3] In the absence of such direction, the officer, though not *entitled* thereto, has sometimes been allowed, upon application, to have a leave of absence for the period of the suspension.[4]

Suspension as a punishment in practice. Suspension has been viewed by some authorities as an objectionable punishment for the reason that it withdraws an officer from use and service while yet retaining him in the army—an abnormal and embarrassing status.[5] In the British law, loss of relative rank has been substituted for it.[6] In our present practice, however, suspension remains a not unfrequent and apparently a generally approved form of punishment.[7] It is also resorted to as an appropriate minor penalty to which may be commuted a dismissal when the latter is deemed too severe a punishment; in which case the status of the officer is the same as if originally sentenced to a suspension for the same term.

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[1] Tytler, 126; McNaghten, 22; 4 Opins. At. Gen., 715.

[2] Circ. No. 5, (H. A.,) 1886.

[3] As to the expediency of this form of the sentence, see G. O. 4 of 1843; Do. 68, Navy Dept., 1865.

[4] DIGEST, 731. In G. O. 42, Dept. of Washington, 1866, a regimental quartermaster, sentenced to suspension from rank for six months is "permitted," by the Dept. Commander, "after turning over all property and moneys in his hands, to leave the department during the period of his suspension."

[5] See Simmons § 115, note; De Hart, 55-58; Benét, 39; G. O. 43 of 1852. As to the injurious effect of the exceptionally protracted suspension in Gen. Swaim's case, see remarks of President Arthur in the G. C. M. O. noted *post*.

[6] Army Act, s. 44. See, "Loss of relative rank or files," *post*.

[7] In the recent case of Gen. Swaim, (G. C. M. O. of 19 1885,) a sentence—"To be suspended from rank and duty *for twelve years*, and to forfeit one-half his monthly pay every month for the same period," was finally approved by the President.

Execution of this punishment. As to its mode of execucution, suspension, like dismissal, is executed, or rather commences to be executed, upon *notice* to the officer of the due approval of the sentence. From and after the date of the order promulgating the approved sentence if communicated to him upon its date, or the subsequent date upon which such order, or other official information of the approval, is actually personally made known to him, the term of the suspension begins and runs on to its end.

Suspension from the Military Academy. This is a further form of the punishment of suspension, applicable only to *cadets.* It has the effect of wholly severing the cadet from the Academy during the term adjudged. Where the suspension is for a considerable term, it is usually added in the sentence that at the end of such term the cadet shall join the next lower class.

Loss of Relative Rank or Files, or Reduction in Grade. This species of punishment, in substance legalized by the British code,[1] is, with us, sanctioned by the established usage of the service.[2] In our practice the punishment consists simply in subjecting the officer to lose a certain number of "files" or "steps" in the list, or to be placed at the bottom of the list, of officers of his rank in his regiment, arm, or corps. In resorting to the milder form of the punishment, the position on the list intended to be assigned the offender is in general specifically indicated by designating the inferior *number* which he is in future to have, or by some such addition as—"so that his name shall appear (or be borne) on the Army Register next below (or above) that of A. B.," (a certain officer named.)

The effect of this punishment is to deprive the officer of such relative right of promotion, as well as relative right of command and of precedence on courts or boards and in choosing quarters, &c., as he would have had, had he remained at his original number. It cannot, however, affect his right to pay or allowances.[3]

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[1] It is designated in the Army Act, s. 44, as—"Forfeiture of seniority of rank in army or corps or both."

[2] See 12 Opins. At. Gen., 547.

[3] 12 Opins. At. Gen., 547.

Like suspension, this punishment has, in some General Orders,[1] been declared to be an objectionable one, on account of the inequality of its effect upon the other officers in the list. But, like suspension also, though less frequently adjudged, it holds its place among the approved minor punishments for officers. It may, however, in some cases operate with more severity than suspension, since, unlike the latter, it has no fixed term but is a "continuing" punishment subsisting till removed by the pardoning power.[2] As remarked of suspension, it is sometimes resorted to by way of commutation for a more severe penalty, as dismissal.[3]

Execution of the punishment. This punishment, like dismissal and suspension, begins to be executed and to take effect at and from the date of the Order promulgating the approved sentence, or the date of the personal and official *notice* to the officer of the due approval of the same.[4]

Reprimand or Admonition, and Apology. Reprimand is one of the punishments enumerated in the Army Regulations, (par. 1019,) as legal for *enlisted men*. Inasmuch, however, as it is most rarely adjudged offenders of this class, and is especially appropriate for cases of officers,[5]—it is preferred to consider it in this connection. This punishment is in terms recognized as a legal penalty for officers by the British code,[6] and in our law is imposable by usage whenever the sentence is discretionary with the court. Though usually awarded for offences deemed materially excusable,—as where the offender has acted without bad motive, or upon a misconception of law or fact, or under extreme provocation,[1] &c.,—and intended as a light penalty,[2] it is yet one of which the quality must necessarily be left to the discretion of the authority who executes it.

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[1] See G. C. M. O. 25 of 1873; Do. 2, Dept. of Dakota, 1873. But in G. O. 43 of 1852, a preference was expressed for it over suspension, by the Secretary of War.

[2] 12 Opins. At. Gen., 547; 17 Id., 31, 656.

[3] In G. C. M. O. 21 of 1868, a sentence of cashiering is commuted in the following terms:—"That he," (naming the officer,) "shall be placed at the foot of the list of second lieutenants, forfeiting all rank and claims and privileges arising from services rendered previous to the date of the promulgation of this sentence." The statement, however, of the *consequence* of the action is of course surplusage. In a recent case, in G. C. M. O. 53 of 1883, a sentence of dismissal is commuted (in part) to—"reduction in lineal rank to the foot of the list of lieutenant colonels of cavalry."

[4] See "Execution of punishment of dismissal," *ante*.

[5] That reprimand is not a regular or appropriate punishment for enlisted men, see Harcourt, 171; Hughes, 94; Bombay R., 37; Macomb, 62; G. O. 31, Dept. of the N. West, 1864; Do. 149, Dept. of the Gulf, 1864; Do. 7, Dept. of Arizona, 1870.

[6] It is designated as "Reprimand, or Severe Reprimand." Army Acts, s. 44.

A court-martial, in imposing a reprimand, may direct that it be either *public* or *private*,[3] according as it is contemplated that it shall be administered in public before the command[4] or published in General Orders, or shall be given by way of personal reproof by the commanding officer in the absence of witnesses. Sentences of private reprimand, though once not unusual,[5] are now most rare in practice. The more frequent form of the sentence is—"to be reprimanded in General Orders," or "to be reprimanded" simply. A designation of the authority by whom the reprimand is to be administered is sometimes added, as—"by the general commanding," "by the Secretary of War," &c. This however is not necessary, the duty properly devolving in all cases upon the legal reviewing authority—the officer who convened the court or his successor for the time being.[6] This officer should be designated, if any one:[7] for the court indeed to designate any *other* officer as the person to execute the sentence would be irregular and unauthorized,[8] and such action would properly be disregarded: the best form is to make *no* designation.

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[1] See Trial of Capt. S. Watson, (Mass. militia,) p. 100. (1811.)

[2] Maltby, 96.

[3] Adye, 221; Tytler, 317; Simmons § 115, 670; Maltby, 97; Macomb, 61; O'Brien, 275; De Hart, 194.

[4] In the early case of Col. Debbiegg, (2 McArthur, 383,) the court sentenced the accused "to be reprimanded in open court," and the reprimand was thereupon administered by the president of the court. Such a form is now unknown.

[5] See instances of sentences "to be *privately* reprimanded" in G. O. 45, Dept. of Washington, 1863; Do. 13, Dept. of Va., 1866; Do. 76, 84, Dept. of the East, 1867; and in the published naval Trials, in 1822, of Capt. Gordon, (p. 440,) and Capt. Hull, (p. 474.)

[6] See DIGEST, 660.

[7] G. C. M. O. 83, Dept. of the Mo., 1871.

[8] In a case in G. O. 15 of 1852, in which a court, convened by a department commander, sentenced an accused "to be reprimanded in Orders from the War Department," it was held by the Secretary of

Further, the court in its sentence cannot properly direct as to the terms of the reprimand, nor as to the time or place at which it is to be given.[1] These also are matters which belong to the province of the reviewing officer.

Admonition is but a milder form of reprimand.[2] A sentence "to be admonished" is an indication that the court deems the offence to be one of a comparatively venial character.[3] To sentence an officer, convicted of a serious offence, merely to be reprimanded or admonished, is a mockery of justice.[4]

Execution of the punishment. In cases of light offences, it has been a not unusual form for the reviewing officer, in approving the sentence, to add in the order:—"The publication of this order will be a sufficient reprimand," (or "admonition,") or in terms to such effect; this constituting the entire execution of the sentence.[5] In cases of more serious offences, the order commonly proceeds to administer a specific reprimand; and in some marked precedents very severe reprimands, in the course of which the merits of the case are reviewed and commented upon,

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War that the court could not properly remove the execution of such sentence from the department commander, who was the legal reviewing officer, to the War Department, and that the sentence was therefore in this respect irregular.

[1] Simmons § 670; Tytler, 317; Maltby, 97; Macomb 62.

[2] Other forms of this sentence which have been resorted to in our service may here be noticed—as: "to be severely reprimanded," G. O. 21, Dept. of the Tenn., 1863; "to be slightly reprimanded," G. O. 7, Army of the Potomac, 1862; "to be reproved," G. O. 5 of 1857; "to be censured in Orders by the Reviewing Authority," (the President,) G. C. M. O. 37 of 1885. In G. O. 51 of 1863, an officer convicted of allowing his men to pillage, is sentenced to be publicly reprimanded "and instructed" by the colonel of the regiment.

[3] See O'Brien, 276. In a recent case in G. C. M. O. 28 of 1880, the sentence adjudged on conviction of a slight offence, is—"To be privately admonished by the commanding general."

[4] See cases in G. O. 64, 68, of 1843; Do. 39 of 1845; Do. 21, Dept. of the Tenn., 1863; Do. 22, Dept. of the Platte, 1867; G. C. M. O. 1, Dept of the Mo., 1888—in which sentences of reprimand, imposed on conviction of grave offences, are disapproved and commented upon as inadequate.

[5] G. O. 25 of 1830; G. C. M. O. 19 of 1871; Do. 109 of 1875; G. O. 5, Dept. of Alaska, 1868. And see Adjutant General Jones' case, O., No. 9, (A. G. O.) of March 13, 1830.

have been pronounced and promulgated to the army.[1] In a few instances the reviewing authority has directed that the reprimand be administered by an inferior commander. *Private* reprimands are executed in such form and at such time and place as the approving authority may in his discretion select.

Apology. Courts-martial have sometimes required in sentences that the accused make an oral or written apology—generally in public, if oral—to another military person, commonly a superior, for disrespectful words, unjust imputations, or other personally offensive and improper language or conduct.[2] The sentence, however, may require that the apology be tendered in writing. In some cases the court has dictated the terms in which the apology should be expressed, or directed that it be dictated by a commanding officer.[3] The British precedents, (which are few in number,) seem to be all cases of officers.[4] In our service the precedents have been nearly all cases in which *soldiers* have been sentenced, in connection with some other punishment, to tender apologies to, (or ask pardon of,) *non-commissioned officers.*[5]

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[1] As in G. C. M. O. 34 of 1872; Do. 3 of 1873; Do. 20, 31, 36, Navy Dept., 1881; Do. 1, Id., 1883.

[2] Simmons § 670, 671; Hough, (P.) 658; James, 56; O'Brien, 68.

[3] See authorities cited in last note. The most marked case is that of Col. Debbiegg, fully reported in 2 McArthur, 383. Here the accused, for disrespectful conduct to his commander, the Duke of Richmond, was sentenced to be reprimanded in open court, "and to make his submission" to that officer; the court dictating the form of submission or apology, in which the accused was caused to "declare his great concern that he should have made use of expressions in his correspondence with his superior officer which, in the opinion of the court, tended to the prejudice of good order and military discipline." This apology was read by the accused, in open court, before his commander present as prosecutor, who thereupon expressed to the court his acceptance of the apology, adding—like a true nobleman and gentleman—"*and I promise Col. Debbiegg that he shall never trace in my behaviour any ungenerous recollection of this transaction.*"

Samuel, (p. 379,) reports a remarkable case of a British Lieut. Colonel, tried in this country during our revolutionary war, for striking a subaltern, and sentenced to suspension; the court adding in the sentence that the junior officer "should draw his hand across the face of the Lt. Col., before the whole garrison, in return for the insult he had received."

[4] A leading case, where the court dictated the form of the apology, was that of Lieut. Gen. Murray, in 1783. Simmons § 671.

[5] See cases in G. O. of April 24, 1841; Do. 70 of 1864; Do. 5, Middle

This punishment, however, like reprimand, is regarded as a more appropriate one for officers than for enlisted men.[1] It is now indeed almost wholly disused in practice.

II. Punishments Legal and Appropriate for both Officers and Enlisted Men.

The punishments of this class are Death, Fine, Imprisonment and Forfeiture of pay, or of pay and allowances.

Death. It is provided in Art. 96 that—"No person shall be sentenced to suffer death except * * * in the cases *expressly mentioned*" in the code. This punishment is so mentioned—(1st,) in Art. 57, and in Sec. 1343, Rev. Sts., where it is specifically *required* to be adjudged upon conviction, to the exclusion of any lesser penalty; (2d,) in Arts. 21, 22, 23, 39, 41, 42, 43, 44, 45, 46, 47, (in time of war,) 49, 50, 51 and 56, where it is in terms *authorized* to be inflicted at the discretion of the court. In a further Article, the 58th, this penalty, though not *named*, is yet *in effect required* to be imposed upon conviction of offences made capital by the local law.

This last article, however, is operative only "in time of war, insurrection, or rebellion." So, it is only at a similar period that death sentences are, by the provisions of Arts. 47, 49, 50 and 51,

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Dept., 1864; Do. 22, Dept. of the East, 1869. In a further case, of a civil employee directed to apologize to an officer, in G. C. M. O. 22, Dept. of Ky., 1865, the apology was directed by the court to be made "in the presence of the commanding general of the post."

Cases of sentence *to ask pardon* are few. In James, 58, is one of a captain sentenced to ask pardon of the major of the regiment. In G. O. 45, Dept. of the South, 1862, is a case of a private sentenced, (in addition to confinement on bread and water,) to ask pardon of a *sentinel*, in the presence of the regiment, for disrespectful language addressed to him.

In this connection may be noted the provision of the 25th Article of war, that a soldier using "reproachful or or provoking speeches or gestures" shall be "confined, and required to ask pardon of the party offended in the presence of his commanding officer;" this penalty, however, being apparently intended to be exacted as a matter of official discipline without a resort to trial by court-martial.

[1] In the case, above cited, in G. O. 5, Middle Dept., 1864, the sentence, adjudging a private, to make apology to a corporal "in front of the parade," was disapproved, for the reason that it was "one which could not be executed except by the act of the prisoner, and could only be enforced by imprisonment, which might be perpetual."

and Sec. 1343, authorized to be resorted to. Further, the acts made punishable in Arts. 41, 42, 43, 44, 45, 46, 56 and 57 are offences which, from their nature, would scarcely be committed except pending a state of war; and, as to the offences designated by Arts. 21, 22, 23 and 39, for which death may at *any* time be adjudged, these, in time of peace, will most rarely be so aggravated as to induce a court-martial to assign the extreme penalty. The result is that this punishment is, in our military law and practice, reserved almost exclusively for the purposes of the administration of justice in time of *war*. About 550 death sentences imposed by courts-martial during the late war are published in the General Orders of the War Department alone.[1]

Our code does not prescribe in any case[2] what form of death penalty shall be imposed. It would therefore be strictly legal for a court-martial to sentence simply that the offender be punished "*with death*," the authority empowered to approve the sentence thereupon directing as to the mode—shooting or hanging—which the usage of the service, in the absence of statutory requirement, has designated as appropriate to the particular offence. In practice, however, the court invariably specifies the form of the penalty, adjudging in general that the accused be *shot* where convicted of desertion, mutiny, or other purely military offence, and that he be *hung* where convicted of a crime other than military, as murder or rape, or of the crime of the spy.[3]

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[1] An additional large number appear published in the G. O. of the different departments and armies, issued during the late war. A further and greater number are to be found in the Orders promulgating the proceedings of cases tried by Military Commissions, where, however, the parties were mostly civilians. A very considerable proportion indeed of all these sentences were commuted or remitted.

[2] Except as indirectly indicated in Art. 58.

[3] Deserters *to the enemy* have sometimes been sentenced to be *hung*. The death penalty is usually unaccompanied by any other penalty in the sentence. In a case in an early G. O. of Dec. 9, 1820, the court, in sentencing a mutineer to be *hung*, add—"*and that his body be offered to the surgeons of the post for dissection*." No other such instance, however, has been met with. An authority similarly to direct, in cases of persons convicted of murder, was conferred upon U. S. courts by a provision of an Act of 1790, now contained in Sec. 5340, Rev. Sts. In a case in G. O. 39, Dept. of W. Va., 1864, tried by a military commission, the sentence is—"to be hung to a tree and left hanging with the inscription, 'Murderer of a Union soldier;'" to which is added by the commission the recommendation "that the building in which the murder was committed be burned to the ground."

It is required by Art. 96 that two thirds of the members of the court shall concur in a death sentence. It has hence become *usual*, though it is not *essential*, for the court to add to such sentence—"two thirds of the members present concurring," or in terms to such effect.

Execution. The reviewing authority, on approving the sentence, will designate such time and place as the convenience or interests of the service may dictate. Where, on account of some exigency, it is found impracticable to proceed with the execution at the time named or at the place selected, another time or place may at the earliest opportunity be indicated, and the execution legally proceed according to the new designation.[1] By the same authority, an inferior commander—as the officer in command of the post, or of the regiment, brigade, &c., at which the prisoner is held or to which he belongs—may be, and usually is, ministerially charged with the direction of the act of execution.[2]

In the absence of an army regulation prescribing a ceremonial for the execution of a capital sentence, the form may be varied in its details at the discretion of the commander, as the want of proper facilities or the exigencies of the service may require, and, in time of war, the procedure is often materially simplified. According to the general usage, where the death penalty is to be inflicted by *shooting*, the prisoner, accompanied by the chaplain, is conducted by a detachment, including a firing party and coffin bearers, and headed by the provost marshal or other officer and band playing the Dead March, to an open space on three sides of which the command is formed facing inwards. The prisoner being placed, the charge, finding, sentence and orders are read aloud. The firing is directed by the officer, and, the execution being completed, the command breaks into column and marches past the body. In a case of *hanging*, the command is "formed in square on the gallows as a centre," and, after similar preliminaries, an "executioner," under the direction of the officer in charge, "performs his office."[1]

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[1] See DIGEST, 112; also case of Coleman *v.* Tennessee, in 97 U. S. Reports, 519, and 16 Opins. At. Gen., 349, in which it was held that a capital sentence, adjudged a soldier by court-martial in May, 1865, but not executed by reason of his escape and the pendency of civil proceedings in his case, might legally be executed in 1879; and this though the soldier had meanwhile been discharged from the service.

[2] See Maltby, 104-5.

Fine. This punishment is specifically designated by Art. 60 of the code as a punishment suitable for embezzlement and other frauds upon the government. It is also recognized in Art. 83, relating to inferior courts-martial, where however it is viewed in practice as substantially synonymous with forfeiture of pay. Subject to the provisions of G. O. 16 of 1895, (in case of enlisted men,) it is legally imposable wherever the punishment is discretionary with the court, but is especially appropriate to those offences which consist in a misappropriation or misapplication of public funds or property, being in general adjudged with a view mainly to the reimbursement of the United States for some amount illegally diverted to private purposes. Where indeed the pecuniary liability of the offender is comparatively slight, forfeiture of pay, as being more readily executed, is a penalty preferable to fine; but of course the amount of pay due at the time of the sentence to the officer or soldier will in general be quite inadequate to meet any considerable obligation. In aggravated cases of embezzlement by disbursing officers—in whose cases this punishment has been mostly resorted to—very heavy fines have been found necessary to measure the total extent of the spoliation of the treasury by the convict.[2]

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[1] See Simmons § 759, 760; 2 McArthur, 345–7; Maltby, 104–8; De Hart, 247–8. And note in this connection 2 McArthur, 395–6, and Burke's Celebrated Naval & Military Trials, 88, 255, as to the impressive ceremonial upon the execution of the death sentence in the case of Admiral Byng, and in that of Richard Parker, leader in the Mutiny at the Nore.

[2] In cases published in G. C. M. O. 196 of 1864; Do. 187 of 1866; Do. 21 of 1871, respectively, fines of $35,000, $45,000, and $445,000 were adjudged disbursing officers convicted of misappropriation. And note, in this connection, cases in G. O. 55, Dept. of Ala., 1865; Do. 8, Id., 1866, where fines, respectively, of $90,000 and $250,000 were imposed by military commissions upon civil officials convicted during the late war of conspiring to defraud the U. S. of the value of captured cotton.

In a recent case, in G. C. M. O. 24 of 1878, where the fine was the amount of a trust fund justly due from the accused, the court added in the sentence—"together with *interest* thereon, from June 1, 1864, to date of payment; said interest to be computed at *six per cent. per annum.*"

Execution. Fine can in general be effectually executed only by means of imprisonment superadded in the sentence as indicated under the next head. In the absence of any such additional penalty, the military authorities cannot of course legally attempt to enforce the fine by any restraint of the person, seizure of the property, or other forcible act.[1] A fine duly adjudged by court-martial may, in the opinion of the author, legally be sought to be collected by a suit commenced in a U. S. court, as money due the United States: no instance however of such a suit is known in practice.

Fine and imprisonment. "The ordinary and appropriate common-law punishment for misdemeanor is fine and imprisonment, or either of them at the discretion of the court."[2] In the military code, the 60th Article makes, specifically, the offences therein described punishable "by fine or imprisonment," and, upon convictions under this article, and by usage under other articles of the code where the punishment is discretionary, the two penalties are frequently combined in the sentence. In the military, as in the civil, procedure, where a fine is imposed, it commonly is, and in general properly should be, added in the judgment that the party shall be imprisoned till the fine is paid.[3]

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[1] Orders to such effect were in some cases made, during the late war,—see G. O. 61 of 1865; Do. 71, Dept. of the Mo., 1863; Do. 181, Dept. of the Gulf, 1864,—but were unauthorized as adding to the punishment.

[2] 1 Bishop, C. L. § 940. "It is a settled principle that where an offence exists to which no specific punishment is affixed by statute, it is punishable by fine and imprisonment. This is so invariably true that in all cases where the Legislature prohibit any act without annexing any punishment, the common law considers it an indictable offence, and attaches to the breach the penalty of fine and imprisonment." Story, J., in U. S. *v.* Coolidge, 1 Gallison, 493.

[3] As to the rule in the civil practice, see Rex *v.* Bethel, 5 Mod., 21; 1 Bishop, C. P. § 1301. In G. C. M. O 27 of 1872, the Secretary of War disapproves the omission "in the sentence of any direction that the prisoner should be confined until he should have made restitution to the United States of the amount of public money found to have been embezzled. Without this provision in a sentence there is no means, in the case of an officer not bonded, of enforcing such restitution beyond the extent of his pay." And see the earlier G. O. 61 of 1865, on the same subject.

In some cases, in directing that the offender shall be imprisoned till the fine is paid, the court has restricted the period by adding—"abating the same at the rate of five (or other number of) dollars *per* day," But, especially as there is no process known to the military law by which a convict, destitute of means, can, because of his inability, be relieved from an imprisonment imposed for the enforcement of a fine,[1] it is usual and proper in a military sentence to declare that such an imprisonment shall not exceed a certain term of months or years; otherwise—the pardoning power not intervening—the confinement might be indefinitely prolonged. When the imprisonment is intended to be inflicted for a separate purpose of additional punishment, as well as with a view to induce the payment of the fine, the form commonly adopted is to adjudge it for a certain period absolutely, and for such further period as the fine may remain unpaid—the latter period, however, not to exceed a certain term specified, or the whole not to exceed a certain term in all.[2]

Imprisonment. This punishment, indifferently also styled "*confinement*" in the military practice, is in terms recognized as a legal penalty in Arts. 17, 60, 83 and 97, and indirectly in Art. 58: usage further sanctions its imposition by general courts-martial, upon officers[3] as well as soldiers, in all cases in which the sentence is left to the discretion of the court; confinement in a *penitentiary*, however, being restricted to cases of the class specified in Art. 97. Imprisonment, where adjudged to *officers*, is almost invariably combined with dismissal: the party is thus

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or in terms to such effect. See G. C. M. O. 633 of 1865; Do. 88, Dept. of Ky., 1865; G. O. 4, Mil. Div. of the Tenn., 1866. In G. C. M. O. 17, Dept. of Miss., 1865, a form of sentence is—to be fined three hundred dollars, and to be imprisoned "one day for every two dollars of said fine, or any part thereof that remains unpaid."

[1] By Secs. 1042 and 5296, Rev. Sts., provision is made for the discharge of poor convicts, sentenced by federal courts to be fined and imprisoned till their fines are paid.

[2] In this class of military sentences, a provision as to the proportionate abatement of the fine is added even more frequently than in the class of cases of fine and imprisonment last above referred to. See, for example, cases in G. C. M. O. 159, 266, of 1865; Do. 31 of 1866; Do. 24, 1867; G. O. 22, 38, Northern Dept., 1865. In G. C. M. O. 155 of 1865, is a sentence imposing a fine of $5000 and a certain term of imprisonment, in which it is added that if the fine is not paid at the expiration of such term, the party shall be confined "one year additional for each thousand dollars until it is paid."

[3] So, the British Army Act, § 44, authorizes, among the punishments for officers,—"Imprisonment, with or without hard labor, for a term not exceeding two years."

not subjected to the confinement as an officer, but as a criminal, and the old rule that a commissioned officer could not properly be held imprisoned is thus substantially observed. Where adjudged to *non-commissioned officers*, it is properly accompanied, in the sentence, with reduction to the ranks.[1]

There are five species of this punishment now recognized in military law: Simple confinement; Confinement at hard labor; Confinement in a penitentiary; Solitary confinement; Confinement on bread and water diet. The two latter, however, are by usage, as expressed in par. 1019, Army Regulations, reserved for enlisted men alone, and will be considered among the punishments appropriate to that class.

Simple confinement. This is either confinement in a guard-house,[2] imposed for slight offences, or confinement (without hard labor) in a military prison[3]—such as that established by military order on Alcatraz Island in the harbor of San Francisco, or such as may be maintained at any military post or station. Where simple confinement in a military prison is imposed, the usual form of the sentence is, in general terms,—"To be confined at such prison, or military prison,[1] (or place,) as the proper authority may designate, for —— years or months;" no particular place of confinement, or reviewing official, being specified.

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[1] Simmons § 687; De Hart, 58, 195; G. O. 11, Dept. of the Cumberland, 1869; G. C. M. O. 112, Dept. of the Mo., 1871; Do. 33, Dept. of the East, 1873.

[2] Sometimes expressed in the sentence under the form of—"To be confined under charge of the guard at his station," or "at the post where he is serving," (for a certain period,) or in terms to a similar effect.

A further mild form of "confinement," sometimes imposed, which, however, is rather a deprivation of privilege than confinement, is—*confinement to the limits of the post.*

A form similar to this occurs in the Navy—"To be restricted to the ship," or to a particular ship—naming it—"to which he is attached," for a certain period stated. Where the sentence is imposed at sea or in a foreign port, the form often is—"To be confined on board ship, (or on a particular ship,) in irons (or double irons) for safe keeping, until he can be sent, (or brought,) to the United States," for a certain further imprisonment specified. See G. C. M. O. 20, 21, 22, 30, 31, 32, 34, 35, 36, Navy Dept., 1886; Do. 17, 18, 36, Id., 1889; Do. 32, Id., 1892. And see Do. 26, 27, 49, 79, Id., 1893; Do. 4, Id., 1894. In Do. 4 & 5, Id., 1887, the form is—"To be confined in irons in port, and as a prisoner at large at sea, until," &c.

[3] Confinement "in light prison," and "in dark prison," are forms peculiar to the discipline exercised over Cadets. See Regs. Mil. Acad., par. 107.

Confinement at hard labor. "Hard labor" is really a distinct punishment, and has formerly, in some instances, been adjudged alone—*i. e.*, unaccompanied, in the sentence, by confinement.[2] It necessarily implies, however, *per se*, a restraint of the person, and is now never imposed except in connection with confinement;—"*to be confined*" (or "*imprisoned*") "*at hard labor*," at a prison named, for a certain specified term, being the customary form of the sentence. Hard labor, being a separate penalty, must be expressed in terms in the sentence, or it cannot be administered[3] except—as will hereafter be noticed—where necessarily involved in the peculiar species of punishment adjudged, as in the case of confinement in a penitentiary.[4]

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[1] In some instances during the late war persons were sentenced by court-martial to be confined in a "fort" or "fortress." See Vallandigham's Case, in G. O. 68, Dept. of the Ohio, 1863.

[2] Sentences simply of "hard labor," or of "hard labor on the public works," or of certain particular labor or labor on particular works—as fortifications bridges, roads, &c., or in breaking stone—unconnected in the sentence with confinement, were not unfrequently imposed during the late war. See G. O. 11, Dept. of the Mo., 1862; Do. 72, Id., 1866; Do. 11, 44, Id., 1867; Do. 101. 102, Dept. of the East, 1864; G. C. M. O. 16, Army of the Potomac, 1864.

Two exceptional sentences of this class are found in the early Orders —G. O. of Oct. 31, 1820, and Do. 56 of 1824—as follows: To serve at hard labor for a certain term "with an iron collar around his neck weighing eight pounds;" and to similarly serve, "chained to a wheelbarrow."

[3] See DIGEST, 441; Simmons § 684; Clode, M. L., 171. The two punishments are referred to as distinct in our 83d Article, in par. 1019, Army Regs., and in the British Army Act § 44.

[4] In the Navy where the confinement is on board ship, "single irons," or "double irons," are not unfrequently added. In a case in G. C. M. O. 48, Navy Dept., 1892, where was imposed a sentence of confinement at hard labor *on shore*, the Secretary of the Navy observes—"In view of the impracticability of employing prisoners at hard labor in naval prisons, the part of the sentence relating to *hard labor* is remitted."

It is a further practice in the Navy to add the penalty of *extra police duty* to sentences of confinement. This is sometimes imposed "during the term of confinement," and is sometimes limited to certain days or hours. "Daily," (or during specified hours of the day,) "Sundays and holidays excepted," is a frequent form.

Confinement in a penitentiary. This form of imprisonment, which had previously been recognized by the legal authorities as a punishment sanctioned by usage for military offenders,[1] was specifically authorized and provided for in a section of an Act of Congress of July 16, 1862, now incorporated in the 97th Article of war[2]—as follows:—"*No person in the military service shall, under the sentence of a court-martial, be punished by confinement in a penitentiary, unless the offence of which he may be convicted would, by some statute of the United States, or by some statute of the State, Territory, or District in which such offence may be committed, or by the common law, as the same exists in such State, Territory, or District, subject such convict to such punishment.*"

The effect of this provision was to add *confinement in a penitentiary* to the punishments which may be adjudged by courts-martial of the Army,[3] when the offence is of the class specified in the statute. That is to say, a court-martial is authorized to impose this penalty only upon a conviction of an offence of a *civil* nature cognizable by such court—as embezzlement, larceny, robbery, homicide or other crime, properly so cognizable under Art. 60 or 62, or in time of war, under Art. 58—and which is also punishable under the local criminal law. For a purely military offence, as desertion, mutiny, misbehavior before the enemy, etc., this punishment cannot legally be imposed.[4]

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[1] Dynes *v.* Hoover, 20 Howard, 65; 9 Opins. At. Gen., 80; 10 Id., 158, 248.

[2] Appropriation is annually made by Congress, generally in the "sundry civil" appropriation Act, for the cost of the "care, clothing, maintenance, and medical attendance," of military convicts confined in State penitentiaries, under this Article of war.

[3] In the Navy, this punishment in cases of officers is of rare occurrence. A case of an officer, in which it was resorted to, is found in G. C. M. O. 27, Navy Dept., 1887. In *Ex parte* Van Vranken, 47 Fed., 888, it was held that under Art. 7, of the Articles for the Navy, it could be adjudged only for a capital offence.

[4] DIGEST, 113, 115; G. O. 4 of 1867; Do. 21, Dept. of the Platte, 1866; Do. 21, Id., 1871; Do. 44, Eighth Army Corps, 1862; G. C. M. O. 34, 35, 43, 46, 72, 73, Dept. of the Mo., 1870.

In *Ex parte* Mason, 105 U. S., 700, a case of assault with intent to kill in violation of the 62d Article, the Supreme Court say—"When the act charged, as 'Conduct to the prejudice of good order and military discipline,' is actually a crime against society which is punishable by imprisonment in the penitentiary, it seems to us clear that a court-martial is authorized to inflict that kind of punishment. * * * The

It is here to be noted that by the recent Act of March 2, 1895, c. 189, by which the Military Prison at Leavenworth, Kansas, is "transferred from the Department of War to the Department of Justice, to be known as the United States Penitentiary," the use of this prison for the confinement of persons "convicted by courts-martial" is expressly restricted to those who have been "convicted of offences now punishable by confinement in a penitentiary, (and sentenced to terms of imprisonment of more than one year.") A soldier convicted of a purely military offence can therefore no longer legally be confined at the Prison at Leavenworth.

In resorting to penitentiary confinement in a case of *larceny*, a court-martial should assure itself that the property stolen is of such *value* as to admit of this form of imprisonment under the civil statute.[1]

By the term "*penitentiary*," as used in the Article, is understood any public civil prison—as the new U. S. penitentiary at Leavenworth, Kansas, aforesaid, the U. S. penitentiary in the District of Columbia, or the prisons "erected by the United States"[2] in the several Territories, or those established by the laws of the different States[3]—in which prisoners are subjected to a course of discipline and labor. A sentence of confinement in a penitentiary is one in which the penalty of "hard labor" is necessarily involved,[4] and in which therefore it need not be added in terms.

A court-martial, in adjudging this punishment, should leave the designation of the particular penitentiary to the reviewing official. The usual form in the sentence is—"To be confined (for a certain term specified) in such penitentiary as the reviewing

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97th Article does no more than prohibit the court from sentencing the offender to imprisonment in a penitentiary in a case where, if he were tried for the same act in the civil courts, such imprisonment could not be inflicted." And see, to a similar effect, *In re* Esmond, 5 Mackey, 64—a case of larceny charged under Art. 62.

[1] G. C. M. O. 17 of 1887; Do. 9, Dept. of the Mo., 1886.

[2] See Sec. 1892, Rev. Sts.

[3] DIGEST, 114. And see par. 1023, Army Regs. The penitentiary at Albany, New York, has been resorted to more frequently than any other State institution. In the recent case of Sgt. Mason, (G. C. M. O. 26, Dept. of the East, 1882,) the order as to the execution of the confinement in a penitentiary adjudged by the court, is—"Subject to approval of the Secretary of War, the penitentiary at Albany, N. Y., is designated as the place of execution."

[4] Millar *v.* State, 2 Kans., 174.

(or proper) authority may designate,"[1] The Army Regulations —par. 1022—contemplate that the court will indicate in terms in the sentence a "penitentiary" as the place of confinement, if such is intended. Where the sentence, however, imposes confinement in "such prison" or "such place" as the proper reviewing commander may designate, and the offence of which the accused is convicted is one within the description of the Article, the commander may legally designate a penitentiary as the place of imprisonment.[2] Dismissal in the case of an officer, and dishonorable discharge in that of a soldier, should be *added* in a sentence imposing this form of confinement.[3]

Term of imprisonment in general. The term of imprisonment imposable by a general court-martial is, (except in the two minor species of confinement appropriate to enlisted men only, and yet to be noticed,) without other limit than such as is prescribed—as to the maximum penalty—by G. O. 16 of 1895, and such as may be prescribed inferentially, in time of war, by Art. 58. In the late war, imprisonments for ten, fifteen, eighteen and twenty years,[4] and even for life,[5] were in some instances imposed for specially aggravated crimes. To be imprisoned "during the war" was at that period also a not unfrequent form.[1] Sentences of confinement "during the remainder of the term of enlistment" of the soldier were then also more common than now.[2] At present—in time of peace—the term of imprisonment fixed for *desertion* is from three months to five years:[3] the latter limit is also rarely exceeded for any *other* offences, except aggravated instances of violent crime taken cognizance of under Art. 62.[4]

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[1] A usual form in the Navy, where the fleet, &c., is at sea or in a foreign port, is—"To be confined on board such vessel, (of the ——— squadron,) as the Commander-in-chief of the Station may direct, until such time as he (the offender) may be sent to the United States in a public vessel; and then in a penitentiary to be designated by the Secretary of the Navy."

[2] G. C. M. O. 8, Dept. of Arizona, 1892; Do. 10, Dept. of the Mo., 1894.

[3] See G. O. 36, 58, 72, Army of the Potomac, 1862; Do. 50, Id., 1864.

[4] See instances in G. O. 397 of 1863; Do. 1 of 1864, G. C. M. O. 210, 506, 577, 582, 625, of 1865; Do. 95, 153, 154, 186, of 1866; G. O. 90, Dept. of the Gulf, 1863; Do. 14, 27, Mil. Div. West Miss., 1865; also Gen. Mack's case, Hough, (P.) 161.

[5] See instances in G. O. 335 of 1863; G. C. M. O. 391 of 1865; G. O. 1, Defences of Washington, 1863; Do. 70, Dept. of the Mo., 1865; Do. 19, Dept. of the Gulf, 1865; Do. 52, Dept. of the Pacific, 1865, Do. 30, Dept. of So. Ca., 1866; Do. 37, Dept. of Va. & No. Ca., 1863; G. C. M. O. 39, 42, 93, Id., 1865; Do. 25, Dept. of Ky., 1865; Do. 31, Fourth Mil. Dist., 1867; Do. 23, Id., 1868; Do. 59, Id., 1869; Do. 153, 175, Fifth Id., 1869; Do. 53, Id., 1870. Imprisonment for life was still more frequently imposed by Military Commissions.

As to the term of confinement in a *penitentiary*, this is not limited or affected by Art. 97 above set forth, and, where the sentence is discretionary—as under Art. 60 or Art. 62—may, (subject to the law fixing maximum punishments,) be imposed without regard to the provision of the civil statute fixing the term of punishment for the act as a civil crime. While such provision may well be taken into consideration in estimating the proper measure of punishment for the offence found, the court may, in its discretion, (subject as above,) considerably exceed the limit of the statute.[5]

Imprisonment after discharge or expiration of term of enlistment. It is now settled by the long-continued usage of the service and practice of the War Department that a military offender may be sentenced to an imprisonment continuing after he has been discharged—*i. e.* that he may be sentenced to be dishonorably discharged and then imprisoned for a certain term. The legality of such imprisonment consists in the fact that, after the discharge, the party is held confined not as a military person but as a *civilian convict*—as an offender against the laws of the United States under the sentence of a tribunal authorized by public statute to punish at discretion the offence committed.

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[1] See case of sentence of imprisonment "for during the war in Missouri," in G. O. 10, Dept. of the Mo., 1863.

[2] In such sentences courts should indicate the date on which the enlistment of the accused expires, (if it does not appear from the specification,) so that the reviewing officer may be at once advised of the exact *term* of imprisonment adjudged and facilitated as to his action. See DIGEST, 440.

[3] See G. O. 16 of 1895.

[4] As in case of Sergt. Mason, (G. C. M. O. 26, Dept. of the East, 1882.)

[5] DIGEST, 114. And see *Ex parte* Mason, 105 U. S., 696, where the term adjudged, of *eight years*, is recognized as legal.

Upon similar grounds it is equally settled that a court-martial may legally sentence a soldier to a term of imprisonment which must necessarily extend beyond the period of his existing term of enlistment, and that the soldier may legally be held confined under the sentence beyond such term, in full execution of the punishment.[1]

Execution of the punishment of imprisonment. Confinement *at a military prison*, which was executed at a great variety of fortified posts during the late war,[2] is now (since the Military Prison at Leavenworth, Kansas, has been superseded as already mentioned,) executed at the prison on Alcatraz Island in the harbor of San Francisco, or at any place of confinement established at a military post.

Confinement *at hard labor* is executed—at places other than the late Military Prison—now U. S. Penitentiary—at Fort Leavenworth—by employing the prisoners in road-making, bridging, erecting or repairing of fortifications or quarters, gardening, wood cutting, policing, &c. At Leavenworth this punishment is executed by means of the "labor and trades" prescribed for the prisoners by Sec. 1351, Rev. Sts., and the manufacturing of supplies for the army authorized to be done by them by the Act of March 3, 1879, c. 182. But, as heretofore remarked, persons sentenced or committed to the Leavenworth prison, are subject to be put at the labor and employments indicated in the statute, whether "hard labor" be or not expressly imposed by the sentence.

A sentence to hard labor is not legally executed by putting the prisoner at *light* work, or work less severe or continuous than that required of other prisoners held at the same prison and similarly sentenced.

The provision of the Act of June 25, 1868, known as the "eight-hour·law," does not apply to prisoners employed at hard labor under sentence of court-martial.[1]

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[1] See O'Brien, 276; G. C. M. O. 61, Dept. of Dakota, 1884; Barrett *v.* Hopkins, 7 Fed., 312. As to the effect of a sentence, imposing imprisonment until or beyond the expiration of the soldier's term, in forfeiting his *retained pay*, see G. C. M. O. 56 of 1891.

[2] Among the principal were Forts Preble, Adams, Warren, Wood, Schuyler, Lafayette, Mifflin, Delaware, Whipple, Norfolk, Macon, Pulaski, Marion, Jefferson, Pickens, Pike, the Rip Raps, Dry Tortugas, Johnson's Island, Camp Chase, Camp Hamilton, Ship Island, and the posts of Wheeling and Nashville.

Confinement *in a penitentiary* is executed by the forwarding of the prisoner under guard to the penitentiary designated by the proper authority,[2] and his delivery, with copies of the necessary orders, &c., to the warden or other official in charge. Upon his commitment, the military prisoner becomes subject to the same government and discipline and to the performance of the same labor as are the civilian prisoners.

Period of execution. The *point of time* at and from which a sentence of Imprisonment for a definite term *begins to be executed*, in the absence of any statutory provision on the subject, is now fixed by par. 1025 of the Army Regulations,[3] which declares that "when the date is not expressly fixed by the sentence or the order promulgating it," (as it rarely is,) "the term of confinement begins at the date of such order." Thus beginning, the execution, regularly, continues to the end of the term of years, months, &c.,[4] adjudged by the court, or till the happening of some event—as the payment of a *fine*—upon which its duration may be expressly made by the sentence to depend, or till a pardon, or remission of the unexpired portion of the punishment, granted by the competent authority; subject also to the possible abridgment of the period by a *credit* gained by good conduct, a matter presently to be noticed.

As heretofore remarked, the fact that the soldier, being sentenced with the confinement to dishonorable discharge, has been discharged accordingly, or that the term for which he enlisted has expired pending the confinement, affects in no manner the due course of the execution of the punishment. The military jurisdiction having once duly attached in his case while he was a soldier, and he having been as such duly tried and convicted, and his sentence of confinement having been duly approved, it is immaterial to its execution whether he actually remain or not in the military service, his status being now simply that of a public prisoner held by the authority of the United States as an offender against its laws.

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[1] See G. O. 71, Dept. of the South, 1869.

[2] As indicated in Army Regs., par. 1023.

[3] As last amended by G. O. 8 of 1894. The regulation concludes—"The sentence is continuous until the term expires, except when it cannot be executed on account of the unauthorized absence of the person sentenced."

The execution of a *cumulative* sentence of confinement commences of course upon the expiration of the term of the previous sentence. See *post.*

[4] "In calculating the period of imprisonment, the day on which the sentence commences, and that on which the prisoner is to be released, are both to be counted." Simmons § 779.

Commencing as indicated, the *term of the execution* continues to run without regard to any intermediate periods during which the prisoner, though in military custody, may not be undergoing the specific confinement adjudged,[1]—as a period during which he is detained at a depot or elsewhere before being forwarded to the place of confinement, or during which he is being transferred to such place, or from such place to another when the place of confinement is changed by competent authority,[2] or during which he may be held in hospital or his quarters under medical treatment.[3] Otherwise, however, as to a period of *unauthorized* absence from military custody, occasioned by an *escape;* the party, on recapture, being legally remanded to serve out the period of his sentence which remained to be served at the date of the escape.[4] So, if he be taken prisoner by the enemy, his confinement will legally commence, or re-commence, after his exchange or parole and return.

That the period of an arrest in confinement before trial, or before final action upon the sentence, however unreasonably protracted, cannot legally be *credited* upon the term of imprisonment imposed by the sentence, in executing the same, and that the reviewing authority, if he thinks it just and proper that this period should be deducted from the term adjudged by the court, can do so only by a proportionate mitigation of the sentence in approving the same, or subsequently by a partial remission,—is also well established.[1] Remissions of what is commonly known as "guard-house time" are not unfrequent in practice.

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[1] See Simmons § 782.

[2] Par. 1027, A. R., declares—"The authority which has designated the place of confinement, or higher authority, may change the place of confinement." Of course, in the procedure of transfer, the punishment must not be *added to*. An *unauthorized* transfer of a prisoner is in the nature of a *trespass* upon him, (Clode, M. L., 171,) and entitles him to be discharged upon *habeas corpus*, as from an illegal imprisonment. *In re* Allen, 7 Jurist, 234.

[3] Simmons § 783; Griffiths, 152, 176; Harcourt, 168; De Hart, 249.

[4] Simmons § 784; Griffiths, 172.

Time credits. The term of imprisonment may, however, legally be abridged in its execution, where the prisoner, by *good conduct* pending his confinement, becomes entitled to such abridgment under the law. By the Act of Congress of March 3, 1875,—"*all prisoners convicted of any offence against the laws of the United States, and confined in execution of sentence in any prison or penitentiary of any State or Territory, (which has no system of commutation for its own prisoners,) shall have a deduction, from their several terms of sentence, of five days in each and every calendar month during which no charge of misconduct shall have been sustained against them, and shall be discharged at the expiration of their several terms of sentence less the time so deducted.*" In view of this Act, (as also of the provision of Sec. 1352, Rev. Sts., authorizing in general terms a similar indulgence for the convicts at the late Military Prison—now U. S. Penitentiary—at Leavenworth,) a General Order, (No. 64,[2]) was, on June 21, 1875, issued from the War Department, by which the rule prescribed in the Act was applied to *military* prisoners, as follows:—"To equalize the practice in regard to punishment of military prisoners, so far as practicable, an abatement of five days for each month of consecutive good conduct may be allowed upon each sentence to confinement for over six months." And it is directed that the commanders of the Departments in which the places of confinement are situated shall issue the special orders for the release of the prisoners who shall become entitled to the allowance. Since the policy of the Government in regard to its convicts has thus been extended to military cases, a large majority of the prisoners confined both at Fort Leavenworth and Alcatraz Island have always been induced so to conduct themselves as to earn and receive considerable abatements of their terms of imprisonment.[3]

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[1] G. O. 105 of 1874; Par. 1028, A. R.

[2] Now made an army regulation—par. 1045, A. R., which has recently been amended by G. O. 40 of Aug. 29, 1894.

[3] As to the regulation of this abatement at the Military Prison, see the Regulations for its government in G. O. 4 of 1891.

Execution of cumulative sentences of imprisonment. As has already been indicated in this Chapter, a sentence of imprisonment duly adjudged a military person who is at the time undergoing a sentence of the same character, (or who has received such a sentence which however has not yet been approved or commenced to be enforced, but is duly approved presently,) is *cumulative* upon the earlier sentence and to be executed accordingly, *i. e.* its execution is to follow immediately upon the completion of the execution of the former punishment, and to proceed in due course till itself completed. This principle is now incorporated in par. 1029, A. R., where it is declared, in general terms —"When soldiers, either undergoing or awaiting sentences, commit offences for which they are tried and sentenced, the second sentence will be executed upon the expiration of the first."

Forfeiture of Pay, &c.—***Authority for this punishment.*** This, though in terms authorized as a punishment by the Articles of war in one instance only—*viz.* by Art. 101 in connection with suspension from command[1]—is in fact authorized, by the *usage of the service*, wherever the sentence is discretionary with the court, and, in cases of soldiers, is the most frequent of all the military punishments.

Distinguished from fine, &c. Forfeiture is to be distinguished from *fine*, a punishment which imposes a pecuniary liability in general, not necessarily affecting pay;[2] and also from *stoppage*, which is not properly a punishment at all but a charge on account, sometimes indeed resulting from punishment as a mode adopted for executing the same.[3]

Different forms of forfeiture. Forfeiture by sentence may be expressed in different forms according to the particular pay or amount of pay intended to be affected. Thus the forfeiture may be general and entire, *viz.* of "*all pay due*," or—a form which is usual where the officer or soldier is detached from the service by a dismissal or dishonorable discharge adjudged by the same sentence, and the object is to cover all possible claims to pay up to the date of the actual execution of the sentence—of "*all pay due or to become due.*" Such a full and absolute forfeiture covers, with the ordinary pay, all retained pay, additional pay, merit pay, &c. Where it is not intended by the court to deprive the accused of his entire pay, the sentence may impose a forfeiture of his pay for a month or months, or of a portion—as one-half, or so many dollars—of such pay,[1] or simply of so many dollars in general terms, or of the pay or a portion of the pay "for the same period" as that of the term of an imprisonment (or suspension) adjudged in the same sentence. A sentence, in forfeiting certain pay, may *except* from the forfeiture an amount stated, to be rendered to the soldier for his use or benefit.[2] Such exceptions, however, are much more rare in the military than in the naval practice.

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[1] As to the nature of this forfeiture see "Suspension," *ante.*

[2] See under "Fine," *ante.*

[3] As to the discretionary authority of the Secretary of War, under Sec. 1766, Rev. Sts., or par. 1489, A. R., to order a stoppage of the pay of an officer in arrears to the United States, see Billings *v.* U. S., 23 Ct. Cl., 166. A *judgment* against the officer is not essential to authorize a stoppage. 17 Opins. At. Gen., 30.

The forfeiture of "allowances." The forfeiture may include "allowances" with pay, though a forfeiture of "pay" alone will not embrace allowances.[3] A forfeiture of "pay *and* allowances" affects, with his pay, any money-commutations or other pecuniary emoluments incidental to the office, rank, or duty of the party and due him at the date on which the sentence takes effect—as the allowance for quarters in the case of an officer, and the allowance for clothing in the case of a soldier.[4] A forfeiture of allowances other than pecuniary—as of rations or clothing as such, would not now be sanctioned by the usage of the service.[1]

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[1] As to the effect of a forfeiture of a portion of the monthly pay, see par. 1032, A. R.

[2] See Chapter XXI—"Mitigation," and G. O., Dept. of the South, of 1881, referred to in note. In the Navy, courts-martial, in sentencing offenders to confinement and forfeiture of pay, frequently except from the amount forfeited so much as may be necessary for "prison expenses," and also a certain small sum to be paid the party on discharge. In a case of this class in G. C. M. O. 22, Navy Dept., 1887, where the sentence, *inter alia*, is "to lose pay and clothing allowance," it is added—"except $2 per month, and such articles of clothing as may be actually necessary for his use."

[3] DIGEST, 418, 560, 731; McNaghten, 27.

[4] In U. S. *v.* Landers, 92 U. S., 77, in which it is held that the term allowances included bounty-money, (and see, to the same effect, 13 Opins. At. Gen., 198,) the court say that—"under the term allow-

The forfeiture to be to the United States only. We have heretofore noticed the principle that a court-martial can neither forfeit pay for the benefit of an individual, nor by its sentence direct as to its disposition.[2] All forfeitures of pay accrue to the United States, and the disposition of the same as public funds is a matter belonging to the province of Congress.[3]

It must be express, and clearly defined. A further principle governing this subject is that pay can be forfeited only in express terms—that a forfeiture cannot be involved in any other penalty. A simple sentence of death,[4] dismissal, dishonorable discharge, or imprisonment, cannot affect the right of the party to such pay as may be due him at the date of the approval or execution of such sentence. Where, therefore, the court intends to forfeit pay, it must express its intention in terms: pay cannot be forfeited by implication.

That the terms of the sentence declaring the forfeiture should be so clear and precise that the specific pay and amount of pay proposed to be divested may fully appear; and that the nature and extent of the forfeiture should be evident from the sentence itself without any reference to other source of information being required—are points which have already been illustrated under a

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ances everything was embraced which could be recovered from the government by the soldier, in consideration of his enlistment and services, except the stipulated monthly compensation designated as pay." And see Sherburne *v.* U. S., 16 Ct. Cl., 491.

[1] Sentences forfeiting all clothing, &c., "except fatigue clothing;" and sentences expressly excepting from a forfeiture of pay and allowances "the necessary clothing and subsistence," or in terms to such effect, are found in the early G. O., but have been long disused in practice.

Forfeiture, by sentence, of *pension*, as an "allowance" or otherwise, is unknown to our military law.

[2] See par. 1035, A. R.

[3] Circ. No. 4, (H. A.,) 1886. As to the appropriation of forfeitures, ("stoppages or fines,") adjudged by court-martial, to the support of the Soldiers' Home, see Sec. 4818, Rev. Sts.

[4] Major Herod's Case, 13 Opins. At. Gen., 103.

previous general head.[1] An instance in which the omission to define the forfeiture intended has caused embarrassment is that of the class of sentences in which a non-commissioned officer is adjudged to be reduced to the ranks with forfeiture of a certain part of his monthly pay. Here it has sometimes been difficult to determine whether the forfeiture applied to pay due the soldier as a non-commissioned officer or to pay to become due him as a private.[2]

Forfeiture as a punishment in general. While forfeiture is the most effective of the minor punishments when judiciously imposed, it may yet be so employed as to be subject to serious objection. Thus depriving an officer or soldier of his *entire* pay, while retaining him in the army, (*i. e.* not dismissing or discharging him in the sentence,)—leaving him nothing for the support of his family, or for the purchase of articles necessary to health, cleanliness, &c.,—has been commented upon as in general contrary to public policy and detrimental to the interests of the service,[3] and is now most rarely resorted to.

Execution of this punishment. Where the operation of the forfeiture is specifically limited by the sentence itself to a particular period, as where it is imposed for the same period as a term of imprisonment or suspension adjudged in the same sentence, there is no difficulty in defining the execution of the forfeiture, the same being concurrent with the term of the principal punishment as determined by the general rules heretofore considered.

Where the operation of the penalty is not thus fixed by the sentence, the date or mode of its execution will depend upon the nature and extent of the forfeiture. Where the sentence in general terms forfeits all pay *due*, the forfeiture, as a general rule, attaches *upon the approval of the sentence* by the proper authority, and to such pay as may then be due and payable to the accused. The approval, *ex vi*, by operation of law, divests his right to such pay and the same thereupon accrues to the United States. Where, however, pay due is forfeited in connection with dismissal or dishonorable discharge imposed by the same sentence, the forfeiture is in general to be considered as intended to take effect simultaneously with the execution of the dismissal by which the military service of the party, and with it—regularly—his right to pay, is terminated.

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[1] See *ante*—"Principles governing the framing of the Sentence," also G. C. M. O. 65, Dept. of Dakota, 1880.

[2] See instance in Circ. No. 3, (H. A.,) 1886.

[3] See G. C. M. O. 2, 5, Dept. of Texas, 1876; G. O. 41, Dept. of the Mo., 1882; Clode, (2 M. F.,) 108.

Where the sentence forfeits pay both due and "to become due," the forfeiture attaches both to pay due at the date of approval and pay accruing monthly thereafter so long as the party remains in the service.[1]

Where the forfeiture is not of the entire pay of the party but of a portion only—as the pay of one month or several months, or a fraction or specified number of dollars of the pay of such a period, or simply a certain number of dollars of his pay in general—such forfeiture may *legally* be, and, it would seem, should be, satisfied out of any amount—whenever accrued—which may be due and payable to the soldier at the regular bi-monthly or other payment next after the approval of the sentence, or out of such amount so far as it will go, where it is less than the amount of the forfeiture, leaving the remainder to be satisfied at the succeeding payment or payments. In practice, however, it seems to have been preferred to exclude from the application of the forfeiture pay due and payable at the date of the approval, and to apply it only to pay accrued subsequently to that date.[2]

Where, pending the execution of a forfeiture of a certain amount of pay or a certain number of months' pay, the term of enlistment of the soldier comes to an end, he cannot be retained in the service for the purpose of satisfying the forfeiture and until it is satisfied, but is entitled to be discharged equally as if no forfeiture had been adjudged in his case. Nor, if he thereupon or subsequently re-enlists, can the unsettled forfeiture be revived as a charge against his pay. For, a pecuniary liability incurred under a certain enlistment can legally constitute an offset only against the amount payable for services under that contract, and can no more be charged against the pecuniary consideration of a new and distinct contract than it can against the pay of another soldier.

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[1] Or until the sentence be remitted. Circ. No. 4, (H. A.,) 1886. In a case indeed of a *deserter*, such a sentence would affect only pay accruing subsequently to his apprehension or surrender, that accrued before being already divested by operation of law, under pars. 132, 1514, A. R.

[2] See par. 1032, A. R. Unless the rule here declared has been adopted for reasons of convenience to the Pay Department, I can perceive no justification for it. It would appear to be implicated with the direction in the last clause of par. 1034, as to which see *post*.

A forfeiture adjudged after, or pending the execution of, a separate forfeiture, and expressed in general terms, or not specifically restricted to a distinct period, becomes *cumulative* upon the earlier one, and is to be executed as an additional liability.[1]

Where the forfeiture is unauthorized in amount. In Circular No. 12, (H. A.,) of 1892 it was declared—"When a sentence of (confinement or) forfeiture is in excess of the legal limit, that part of it which is within the limit is legal, and may be approved and carried into execution." This would apply to the punishments of inferior courts, and to the punishments exceeding the maximum limits fixed by the order of the President. The ruling, if of doubtful authority, certainly conduces to discipline and to the convenience of administration.[2]

Official noting of forfeiture and action of paymaster. In all cases where soldiers remaining in the service are subjected to sentences of forfeiture, the amount and particulars of the forfeiture, with the date, number and source of the General Order approving and promulgating the sentence, should be noted by the company or other proper commander opposite the name of the soldier upon the Muster-and-Pay Roll made out for the command next after the publication of the sentence at the post or station. The forfeiture will then be enforced by the paymaster who pays the command and who will either deduct the amount of the forfeiture from the amount of pay accruing to the soldier, or will omit to pay him altogether, according to the extent of the forfeiture and the nature of the sentence. The forfeiture, if not cancelled at the first payment, must be continued to be noted on successive rolls till fully discharged.[3]

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[1] Compare par. 1034, A. R.

[2] See a recent case in G. C. M. O. 4, Dept. of the East, 1894, of the approval of that proportion only of a forfeiture which was considered to be within the legal limit.

[3] See G. O. 89 of 1883.

Effect of a remission upon execution of pending forfeiture. A remission in whole or in part of a pending forfeiture may and properly should, in the opinion of the author, take effect upon any pay accrued and payable, and not actually forfeited, at its date. Thus if a soldier is sentenced in January to forfeit two months' pay, and in February the forfeiture is remitted, he would be entitled, at the bi-monthly payment at the end of February, when his pay account for the two months is regularly settled, to receive his full pay for the two months, the forfeiture being entirely removed by the remission. The practice, however, is not in accordance with this view, being governed by par. 1034 of the Army Regulations, which declares that—"*An order remitting a forfeiture of pay operates only on the pay to become due subsequent to date of the order.*" In adopting this rule, for the convenience quite evidently of the Pay Department, it was apparently not perceived that it has the effect of restricting the plenary pardoning power vested in the President, and that exercisable under the 112th Article of war, and is thus without legal authority.

III. PUNISHMENTS LEGAL AND APPROPRIATE FOR ENLISTED MEN ONLY.

These are Reduction, Dishonorable Discharge, Solitary Confinement, Confinement on bread and water diet, Ball and Chain.

Reduction.—***Nature of and authority for the punishment.*** This punishment, commonly termed reduction to the ranks,[1] consists, in our service, in the degrading of a non-commissioned officer—sergeant or corporal of a company—to the rank and status of a private.[2] Reducing to an intermediate grade, as from sergeant to corporal, is not known to our law.[1] The punishment, as adjudged in our practice, is absolute, *i. e.* without limitation as to *term.*[2] It is specifically mentioned in a single Article of war, the 37th, where it is *required* to be imposed upon conviction of the offence of conniving at the hiring of his duty by a soldier. By the authority, however, of the usage of the service, recognized indeed in par. 1019 of the Army Regulations, it may be imposed by any court-martial wherever the sentence is discretionary.

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[1] It was formerly sometimes designated as reduction to the "rank" or "station" of a "private sentinel." See Tytler, 318; Macomb, 62; also cases in the early General Orders.

The following are forms of sentences of reduction found in the G. C. M. O. of the Navy:—A "seaman, to be disrated to landsman;" A "seaman-apprentice"—to "second-class apprentice;" A "first-class fireman"—to the "next inferior rating;" The same—to the "rate of a coal-passer;" A "boatswain's mate, second class," to seaman; A "bayman" to "landsman;" A "writer, second class, to the rating of landsman."

[2] A non-commissioned officer of the Engineer Battalion may be reduced to a private of either the *first* or *second class*, established by Sec.

Reduction by sentence as a *punishment* is to be distinguished from the reduction authorized by the Army Regulations, (par. 254,) which may be ordered by the commander of a regiment.

Properly adjudged with confinement. As has already been remarked,—when a term of imprisonment is adjudged a non-commissioned officer, the sentence should also embrace reduction. This for the reason assigned by the authorities, that to retain the sergeant or corporal under the circumstances in his rank must tend to degrade the same and detract from the respect due to it, and that therefore, when thus punished, he should be punished as a private soldier. In such a case also the sentence should properly be so worded as to require or allow the reduction to take effect before the imprisonment is entered upon.[3]

Reduction with ignominy. In some few cases reduction has been made ignominious, *i. e.* has been directed in the sentence to be accompanied by the cutting off, in the presence of the command, of the chevrons and stripes of the non-commissioned officer.[4]

1155, Rev. Sts. See a case of such reduction to a private of the "second" class in G. C. M. O. 70 of 1868.

A reduction, by sentence, of a sergeant "to the grade of a recruit," was properly held illegal, there being no such grade. G. C. M. O. 21 of 1893.

[1] Otherwise in the British code. Army Act § 44, 183.

[2] In G. O. 76 of 1824, is a case of a corporal sentenced "to perform the duties of private sentinel *for one month.*" Such a sentence would not be warranted by present usage.

[3] See Hughes, 95; Hough, (P.,) 734.

[4] See instances in G. O. 11 of 1849; G. C. M. O. 70 of 1868, G. O. 46, 67, Army of the Potomac, 1861. In G. C. M. O. 7, Navy Dept., 1887, is a sentence of a non-commissioned officer of Marines—"To be reduced to the rank of private, and to have his insignia stripped off in presence of all the marines at the station."

Execution of the punishment. This is a punishment which, like dismissal in the case of an officer, executes itself, taking effect, as it does, at once upon the approval of the sentence and notice to the accused. Upon the promulgation and announcement to him of the approval by the competent authority, he ceases forthwith to be a non-commissioned officer and becomes a private, no further act being requisite to make the punishment operative in law: his pay also is from the same date correspondingly reduced. He cannot however legally be required to surrender his *warrant* as sergeant or corporal, unless it is expressly declared therein, or is accepted by him upon the express condition, that it shall be surrendered upon reduction.

A non-commissioned officer duly reduced by sentence remains reduced, (and borne on the muster-rolls as a private,) till the end of his enlistment, or till the punishment, (which is a "continuing" one,) is remitted by the competent pardoning authority. But even a remission will not restore him to his former rank if the vacancy caused by his reduction has been filled. In such a case he cannot, after remission, be restored till a vacancy occurs and he is reappointed by his regimental commander.

Reduction of officers. By two statutes enacted and in force during the late war, reduction to the ranks was authorized as a punishment for *commissioned officers.* These were the Act of March 3, 1863, c. 75, s. 22, empowering courts-martial—"*to sentence officers, who shall absent themselves from their commands without leave, to be reduced to the ranks to serve three years or during the war;*" and the Act of the same date, c. 120, s. 6, requiring the imposition of this punishment upon officers convicted of failing to turn over to the proper official "*captured or abandoned property*" coming into their possession. No case is known of a conviction under the latter statute, and but few trials were had under the former.[1] No Act passed since the war has

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[1] Instances of officers convicted under this statute and sentenced to reduction are published in G. O. 27 of 1864; Do. 80, Dept. of the Gulf, 1863; Do. 38, Dept. of the East, 1864; Do. 36, Middle Dept., 1864, Do. 5, 2d Div., 5th Army Corps, 1864; G. C. M. O. 25, 51, Army of the Potomac, 1864; Do. 12, Id., 1865.

Reduction is authorized of *cadet officers,* (Mil. Acad. Regs. § 107,) but these are not commissioned officers of the army.

Reduction is a recognized punishment for officers in the European armies. See recent case of the reduction to the ranks of a Russian authorized such punishment. Reduction of officers *in grade*—as from captain to lieutenant—is also unknown to our law.[1]

Dishonorable Discharge.—***Nature of and authority for the punishment.*** This punishment corresponds to dismissal in the case of an officer, in that it expels the offender with disgrace from the army and remands him to the status of a civilian: it entails however no legal disability either military or civil.[2] It is to be distinguished from the discharge given by executive *order*, as authorized by Art. 4, the latter being, not a *punishment*, but a mere rescinding or discontinuance of a contract.[3]

Dishonorable discharge, though not expressly required or authorized to be adjudged for any particular offence by the Articles of war, is indicated in general terms by Art. 4, as a penalty which courts-martial may award, and is recognized in the Army Regulations, (par. 1019,) as a legal punishment for enlisted men: it may thus be imposed wherever the sentence rests in the discretion of the court.

When properly resorted to. This punishment is usually and properly adjudged by courts-martial in connection with terms of imprisonment in a military prison or penitentiary; it being in

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general officer by the Czar in 1892. N. Y. Herald, September, 1892. In 1887, the Czar commuted to this punishment the sentences of exile to Siberia of eighteen young officers convicted of engaging in a revolutionary conspiracy. N. Y. Herald, Nov. 30, 1887.

[1] In Gen. Swaim's case, (G C. M. O. 19 of 1885,) a sentence, *afterwards withdrawn*, prescribed that the accused, in addition to suspension, should be reduced to a lower grade and rank in his corps. Upon this it is remarked by the President as follows—"The provision that the accused shall, after a suspension for the period of one year from rank and duty in the office now held by him, be placed in another office of lower rank in the department of which the office now held by him is a part, is one impossible of enforcement by the Executive alone. That office of lower rank can only be filled in the method pointed out by the Constitution, namely, nomination by the President and confirmation by the Senate, and then only in case of an existing vacancy. The amended sentence, in effect, creates an office and fills it, thus at once embodying the exercise of legislative and executive functions, and the approving power of the Senate." In consequence of this disapproval, a new sentence, not legally objectionable, was substituted.

[2] Dishonorably discharged soldiers, who have also been confined under their sentences at Fort Leavenworth or Alcatraz Island, are not unfrequently re-enlisted where their record for conduct in confinement has been good.

[3] See FOURTH ARTICLE, in Chapter XXV, *post.*

general regarded as for the interests of the service that a military convict, before being subjected to a protracted confinement, should be formally separated from the army.[1] The view has also been repeatedly declared in General Orders that dishonorable discharge *alone* is not an adequate or proper penalty for desertion or other grave military offence, since merely to require soldiers, upon conviction of such offences, to leave the army is in effect to offer a premium for their commission.[2] On the other hand it has been viewed as an inappropriate, and too severe, punishment for a single act—especially where a first offence—of breach of discipline.[3] The result is that dishonorable discharge, except in combination with confinement, has become a comparatively rare form of sentence in our service; and, where resorted to, it is usually also accompanied with forfeiture of pay.

Form of the punishment.[4] The ordinary and proper form of this punishment in a sentence is—"to be dishonorably discharged;" the words "the service," or "from the service" or "military service," or "the service of the United States," being often added. The form—"to be discharged the service," without using the word "dishonorably," though unusual, is sufficient in law, and has the same effect as if such word were not omitted; the discharge adjudged by a sentence being a *punishment* and therefore necessarily dishonorable.[1] A sentence—"to be *dismissed* the service," while a rare and irregular form, inappropriate to a case of a soldier, has, where employed,[2] the same effect as if the word *discharged* had been used.[3] Where dishonorable discharge and imprisonment are imposed together, the sentence will preferably be so expressed as to indicate that the soldier is to be first discharged and *then* imprisoned.[4]

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[1] See G. O. 36, 58, 73, Army of the Potomac, 1862; G. C. M. O. 50, Id., 1864; Do. 71, Dept. of Texas, 1873. The discharge not only relieves the army of a member found unworthy, but—the number of enlisted men being fixed by statute—enables the authorities to enlist a new man in his place.

[2] Such a sentence is particularly objectionable where the soldier has yet a long time to serve under his enlistment. G. C. M. O. 23, Dept. of the Mo., 1870.

[3] G. O. 9, Dept. of the South, 1873; Do. 61, Id., 1874; G. C. M. O. 42, Dept. of Texas, 1874; Do. 18, Div. of Pacific & Dept. of Cal., 1881. Otherwise where the offence is a grave one, exhibiting the soldier as morally unfit to remain in the service—such as larceny. G. O. 48, Dept. of Dakota, 1869. In a case of a post quartermaster sergeant, convicted of drunkenness on two occasions, it is observed by Gen. Merritt, (G. C. M. O. 30, Dept. of the Mo., 1887,)—"A non-commissioned staff officer, convicted of drunkenness, should not be permitted to remain in the service."

[4] In the Navy, beside *dishonorable discharge*, imposed as in the Army, occurs sometimes the following form—"*To be discharged with bad-conduct discharge.*" G. C. M. O. 37, Navy Dept., 1887; Do. 70, Id., 1889.

It may be added that the court, when proposing to award this punishment, should adjudge it in specific terms. No other punishment, (except death,) nor any conviction of an offence however grave, can operate *per se* to discharge a soldier from the army.[5]

Discharge with ignominy. A mode of dishonorable discharge, sanctioned by usage for time of war,[6] is *drumming*, (or bugling,) *out of the service*,[7] with the "Rogue's March," in the presence of the command. This ignominious form is sometimes conjoined with circumstances of *special* ignominy. Thus soldiers have been sentenced to be drummed out after having their clothing stripped of all military insignia, or after being tarred and feathered, or with their heads shaved or half-shaved, or with straw halters around their necks, or bearing placards inscribed with the names of their offences.[1]

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[1] It is of course not within the power of a court-martial to award an *honorable* discharge. Nor can it award what is now designated as a "discharge without honor." See FOURTH ARTICLE, ch. XXV, *post*.

[2] See instances in G. O., May 17, 1821; Do. 298 of 1863; G. C. M. O. 227, 616, of 1865; Do. 58, 66, of 1866.

[3] G. O. 45, Dept. of the Cumberland, 1867.

[4] A sentence adjudging a dishonorable discharge "to take effect at such period *in a term of confinement* as shall be designated by the reviewing officer," was disapproved as exceptional and irregular, by the Secretary of War, (concurring with the Judge Advocate General,) in G. O. 90 of 1872, (now incorporated in par. 1030, A. R.) And to a similar effect see G. O. 30, Dept. of Cal., 1872.

In the *naval* practice, the dishonorable discharge is usually adjudged to *follow* the imprisonment.

[5] It has been held in a civil court that a conviction of *bigamy* could not so operate. Regina *v.* Creamer, 10 Lower Canada R., 404.

[6] This punishment—as also shaving of the head—has been referred to in some Orders, (see G. O. 44, Dept. of the Mo., 1867; Do. 51, Id., 1880,) as not authorized because not contained in the list of "legal" punishments set forth in G. O. 4 of 1867, (now par. 1019, A. R.) Instances of these punishments, however, occur as lately as in G. C. M. O. 23, 40, of 1867; Do. 6, 36, 55, of 1868; G. O. 52, Dept. of the South, 1870; Do. 30, Id., 1871. As to the non-application of par. 1019 to time of war, see text *ante*, p. 563-4.

[7] The sentence has sometimes been phrased, in general terms—"to be ignominiously discharged." As in G. C. M. O. 596, 616, of 1865.

Execution of the punishment. This punishment is executed by the delivery to the soldier of a certificate or "discharge in writing," which, as required by the 4th Article of war, must be "*signed by a field officer of the regiment to which he belongs, or by the commanding officer when no field officer is present.*" The delivery may be constructive. If the soldier is at the time in confinement awaiting sentence, (or under a previous sentence,) a delivery of the discharge to the post commander, or other proper officer, *for him*, to be rendered to him on his release from confinement, is equivalent to a delivery to him personally. The discharge will be worded in the usual form, as "furnished from the Adjutant General's Office,"[2] but the blank in the body of the certificate, for the insertion of the cause or occasion of discharge, will be filled by a statement to the effect that the same has been given in consequence of the sentence of a general court-martial published in a certain General Order, describing it by the command or authority from which it has proceeded, its number and date.[3] Such statement will show that the discharge was awarded as a *punishment* and is therefore *dishonorable* in law.

The clause generally added in discharges, that "no objection to the re-enlistment of the soldier is known to exist," is properly struck out; and the space at the bottom of the certificate headed "Character," (which, however, is no part of the discharge,) is filled out or cut off as directed in the Army Regulations.[4]

Where this punishment is imposed in connection with *imprisonment*, the terms of the sentence will in general indicate whether the discharge is intended by the court to take effect before the imprisonment is entered upon or after it is completed. To *post-*

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[1] Instances of these forms are to be found in G. O. of Aug. 6, 1813; Do. of Feb. 1, 1814; Do. 32 of 1822; Do. 34 of 1826; Do. 4 of 1828, Do. 29 of 1835; Do. 39 of 1838; Do. 80 of 1842; G. C. M. O. 124, 163, 276, 294, 432, 442, 513, of 1865; Do. 11, 224, 227, of 1866; Do. 23, 40, of 1867; Do. 6, 36, 55, of 1868; G. O. 49, Army of the Potomac, 1862; Do. 49, Dept. of the South, 1862; Do. 11, 20, Northern Dept., 1864; Do. 33, Dept. of the East, 1868.

[2] Par. 146, A. R.

[3] Par. 143, A. R.

[4] Par. 143, A. R.

pone until after a term of imprisonment a dishonorable discharge required by the sentence to be executed first in order, has been held by the Judge Advocate General to be beyond the authority of a reviewing officer.[1] In practice, where the penalty of dishonorable discharge is mentioned in the sentence *before* that of the confinement, it is understood as intended to be executed first and is executed accordingly.

Forfeiture of pay usually accompanies dishonorable discharge in a sentence. Where not expressed, however, the effect of the dishonorable discharge is to forfeit the pay due at the date of the discharge and dependent upon its character for its payment—as all *retained pay.*[2]

Ignominious discharge by drumming out, &c., is generally executed upon the party in the presence of the command, under the immediate direction of the adjutant, provost marshal, or other suitable officer, the proceedings and orders in the case being first publicly read.[3] In a case in the Army of the Potomac,[4] the form of the execution was indicated as follows:—"To be drummed along his regiment at dress parade, preceded by the drum band playing the Rogue's March and a file of soldiers with arms reversed, and followed by a file of soldiers at 'charge bayonets.'"[5]

Solitary Confinement. The usage of the service, as recognized and expressed in par. 1019 of the Army Regulations, is the authority for this form of imprisonment. In par. 1021 it is specified that the same "*shall not exceed fourteen days at a time*, or *eighty-four days in any one year.*"[1] The term, therefore, of this confinement can in no case legally transcend the limit here fixed,[2] nor can it properly transcend for any period the *proportion* indicated.[3] Such term has in some instances indeed been extended, but not lawfully since the adoption of the regulation.[4]

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[1] This opinion was approved by the Secretary of War in G. O. 71 of 1875, and is now incorporated in Army Regs., par. 1031.

So, when a sentence provides for the dishonorable discharge of a soldier at the termination of an imprisonment, (now a rare case in the army,) it has been held by the same authority that it is not within the province of the reviewing officer to order his immediate discharge. DIGEST, 357. See this opinion followed by Maj. Gen. Hancock in two cases, in G. O. 52, Dept. of Dakota, 1872.

[2] Secs. 1281, 1282, Rev. Sts.; Par. 1503, A. R.

[3] See De Hart, 249.

[4] G. O. 49 of 1862.

[5] In an old case—in G. O. of Aug. 6, 1813—two privates, on conviction of mutinous conduct, are sentenced in full as follows: "Each to be kept in close confinement, fasting, and in irons, for 24 hours; after which to have, severally, the hair on the left side of the head shaved off and on the right side painted, and to be tied together by the neck, and sent with a guard, and drums and fife playing the Rogue's March, from the encampment on the Severn, through the streets where the offences were committed, through Church street and on to the suburbs of the town," (Annapolis,) "where they shall be discharged."

In the early sentences the solitary confinement was sometimes required to be "in the black hole."[5] Later it has in a few cases been directed to be executed in a "light cell,"[6] or in a "dark cell."[7] In one of these cases[8] solitary confinement in a dark prison was disapproved, as being a punishment likely to impair the health of the prisoner.

Confinement "on Bread and Water Diet." This form of confinement, which is derived from an early period, being mentioned in Arts. 43, 81 and 129, of the Code of Gustavus Adolphus, is specified in par. 1019 of the Army Regulations as among the legal punishments for soldiers. Though formerly frequently employed in our service, it is now comparatively rare. Where resorted to in the later cases,[1] it has generally been adjudged in connection with solitary confinement, and the Regulations, (par. 1021,) prescribe for it the same limits as to duration.

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[1] That is to say, "no more than six such periods" of fourteen days "in any one year." G. O. 75, Army of the Potomac. 1862.

The total of 84 days is, of course, the quantum by *one* sentence. Simmons § 683.

[2] In a case in G. O. 75, Army of the Potomac, 1862, a penalty, in a sentence, of *one year's* solitary confinement was properly disapproved as unauthorized.

[3] Thus, where a sentence imposed solitary confinement for two days out of every three in a term of two months—*i. e.* forty days out of sixty—the legal proportion was held to be exceeded. DIGEST, 708.

[4] In a case in G. O. 72 of 1832, (before the date of the regulation,) a term of this confinement for *six months* was legally adjudged. In a case in G. O. 234 of 1863, (since the date of the regulation,) a sentence, (upon a conviction of a soldier of murder,) which embraced solitary confinement at hard labor for *eighteen years*, was (improperly) approved; but the unexecuted portion was remitted in the later G. C. M. O. 186 of 1866.

[5] See G. O. of April 3, 1809; Do. of Aug. 12, 1836.

[6] G. C. M. O. 50 of 1873.

[7] G. C. M. O. 24 of 1873.

[8] See the G. C. M. O. last cited. More recently, however, it has been employed at Fort Leavenworth as a punishment for convicts tried under Sec. 1361, Rev. Sts. See G. C. M. O. 3, Dept. of the Mo., 1878, imposing dark cell on bread and water.

Ball and Chain. This punishment, still recognized as legal by the Army Regulations, (par. 1019,) has been adjudged in sentences from an early period, generally in cases of soldiers convicted of desertion, or of aggravated offences characterized by violence, and in connection with the punishment of imprisonment. In some instances it has been imposed continuously for long periods—in one instance indeed for and during an entire term of five years' confinement.[2] In another class of cases this penalty has been awarded for a portion or portions only of the term of the sentence,—as for the "first twenty days of each month" of a term of five years' confinement,[3] or the "first week of every three months" of a term of one year,[4] or for "each alternate week" of a confinement "during the continuance of the rebellion."[5]

It has been remarked in a General Order[6] that whenever ball-and-chain is imposed, the sentence "should state the weight of the ball, the length of the chain, and how to be attached." In practice, the court has generally fixed the weight of the ball[7] at from six to forty, (most frequently perhaps twenty-four,) pounds, and the length of the chain at from three to six feet, and has specified that the latter should be attached sometimes to the right leg or ankle and sometimes to the left. In certain of the cases the weight indicated is that of ball and chain combined; in others the chain is directed to be of a "convenient" length; in others it is specified simply that the party is to be confined "with ball and chain." In an early instance, a part of the sentence is—"to wear a ball and chain attached to his *neck* for two weeks."[1]

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[1] G. C. M. O. 68 of 1867; Do. 24, 50, of 1873. In G. O. 287, Navy Dept., 1882, this punishment, and also "solitary confinement on diminished rations," are condemned, and it is declared that they "will hereafter be disused." In G. C. M. O. 47, Navy Dept., 1886, however, is a sentence imposing "solitary confinement on bread and water for a period of 30 days, with full rations every fifth day." And see similar case in Do. 20, Id., 1891.

[2] This part, however, of the sentence was remitted. G. C. M. O. 465 of 1865.

[3] G. C. M. O. 595 of 1865.

[4] G. C. M. O. 651 of 1865.

[5] G. C. M. O. 306 of 1865.

[6] G. O. 8, Dix's Division, Baltimore, 1862.

[7] A shell filled with lead has sometimes been indicated instead of a ball.

This punishment, however, though very frequently imposed during the late war, is now comparatively rarely adjudged. The opinion was expressed by Judge Advocate General Holt that it was not a penalty to be resorted to except in aggravated cases, and, in his reviews of the proceedings of court-martials which directed it, he commonly advised that it be remitted except where the offender was shown to be a violent person, or where attempts to escape were to be expected and he could not otherwise be secured.[2]

VI. PROHIBITED AND DISUSED PUNISHMENTS.

As a part of the history of Military Punishment, it is proper here to make reference to certain penalties, formerly adjudged by sentence of court-martial, but now either expressly *prohibited* by statute, or *disused* in practice, at least in time of peace.

Obsolete Penalties. Some of the military punishments of the Romans and early Germans have been mentioned in Chapter II. In the early English Articles and contemporary Code of Gustavus Adolphus are prescribed sundry punishments long obsolete, such as—Decimation, (where regiments were concerned in misbehaviour before the enemy;[3]) Beheading;[4] "To be drawn," (in connection with the death penalty;[5]) To be drowned or buried, bound to the person killed, (a punishment for homicide;[6]) To have the tongue perforated with a red hot iron, (for blasphemy;[7]) Loss of the right hand, or of a hand;[8] Loss of an ear;[9]

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[1] G. O. of Jan. 26, 1814.

[2] DIGEST, 697.

[3] Arts. 60, 67, 73, of Gustavus Adolphus; Art. 8 of James II. And see Art. 13, Sec. VI, of Charles I.

[4] Arts. 2, 7, 10, 20, 21, of Richard II.

[5] Arts. 2, 9, 17, of Richard II.

[6] Ordinance of Richard I.

[7] Art. 1, Sec. I, of Charles I; Art. 4 of James II.

[8] Ordinance of Richard I; Arts. 22, 29, 32, 33, of Gustavus Adolphus.

[9] Arts. 8, 11, 24, of Richard II.

Running the Gate-lope;[1] To be "beaten through the quarters;"[2] To be ducked in the sea;[3] To perform the duty of scavenger;[4] To forfeit his horse,[5] or his horse and armor.[6]

In American Law. In our law, of the class of *prohibited* punishments are Flogging, and Branding or Marking; of *disused* punishments are Weight carrying, Wearing of irons, Shaving of the head, Placarding, Standing on or carrying a barrel, and a variety of other forms of corporal punishment.

Flogging—*The law on the subject.* Our original code of 1775, in enumerating—in Art. 51—the punishments authorized to be imposed by courts-martial, specified—"whipping, not exceeding thirty-nine lashes," and in the "Additional Articles" of that year, certain offences were declared to be punishable with "not less than fifteen" (or "twenty") "nor more than thirty-nine lashes." In the code of 1776, it was provided, by Art. 3 of Sec. XVIII, that "not more than 100 lashes should be inflicted on any offender at the discretion of a court-martial." To the same effect was Art. 24 of 1786; a proposition to extend the limit to 500 lashes having meanwhile—in 1781—been rejected by Congress.[7]

Public whipping was also authorized by certain statutes of this period as a punishment for sundry *civil* offences—as, by the Act of April 30, 1790, c. 9, for larceny, embezzlement, &c., the limit being fixed at "thirty-nine stripes," and by the Act of March 2, 1799, c. 43, for robbing the mail, &c., the limit being forty lashes. It was finally abolished as a punishment for civil offences by the Act of February 28, 1839, c. 36, s. 5.

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[1] See Art 122 of Gustavus Adolphus. "Running the gantlet," (the same punishment,) was sometimes practised in our army in the Revolutionary War. See Thacher's Military Journal, 183.

[2] Art. 80 of Gustavus Adolphus.

[3] Ordinance of Richard I.

[4] Art. 40 of James II. And see Arts. 60, 72, 79, of Gustavus Adolphus; Art. 13, Sec. VI, of Charles I. The doing of "police duty," however, though no longer adjudged by sentence of court-martial, is sometimes, though not always legally, imposed as a measure of discipline.

[5] Arts. 4, 11, 24, of Richard II.

[6] Arts. 5, 6, 8, 13, 14, 15, 23, 26, of Richard II. And see Arts. 1, 17, of Same, as to penalty of forfeiture of goods and heritages; also Arts. 66 67, 68, of Gustavus Adolphus, as to confiscation of goods.

[7] 3 Jour. Cong., 634.

In the military code of 1806, the 87th Article fixed the maximum of this punishment at fifty lashes; but, a few years after, by an Act of May 16, 1812, this provision was expressly repealed, and whipping or flogging for the time done away with. By the Act, however, of March 2, 1833, this form of discipline was revived for cases of *deserters.* At length, at the beginning of the late war, by a statute of August 5, 1861, it was enacted—"*that flogging, as a punishment in the Army, is hereby abolished.*"

The code of 1874—in Art. 98—merely states the existing law, in regard to flogging, in enacting that—"*No person in the military service shall be punished by flogging, (or by branding, marking or tattooing on the body.)*" An Article of the Naval Code—No. 49—is expressed in almost identical terms. By Sec. 1354, Rev. Sts., it is forbidden to subject to whipping a prisoner at the Fort Leavenworth Military Prison.[1]

In the British law, flogging is no longer authorized to be adjudged as a punishment by courts-martial,[2] though it may be employed as a corrective, to the extent of twenty-five lashes, at military prisons.[3] For some *civil* offences—mainly violent assaults—it may legally be inflicted to the extent of not more than fifty lashes at one time.

As heretofore administered. The disrepute into which this punishment has fallen is in great part due to the fact that formerly, in the British service, it was carried to a brutal and perilous extreme. "Five hundred lashes" was a not uncommon sentence; one thousand were imposed in repeated recorded cases; and fifteen hundred and even two thousand were sometimes reached.[4] The execution of such sentences, while savage in its cruelty to the subject, was demoralizing to those who inflicted and who witnessed it. The offender being secured in an unnatural position, the lashes were applied by an enlisted man, (a "right-and-left-handed drummer" being preferred,) with the "cat," (its thongs sometimes steeped in brine or salt and water,) upon the bare back and shoulders, which soon became flayed and raw. The victim was not relieved till the surgeon pronounced that he had endured as much as could safely be inflicted for the time. He was then removed to the hospital, to be brought out again, when his wounds were partially healed, for a second instalment of the punishment, and this process was repeated till the whole number of lashes had been administered. The sufferer, however, sometimes perished under the blows, or in consequence of the injuries received, before the law had been fully vindicated.[1]

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[1] The whole Sec. is—"*In no case shall any prisoner be subjected to whipping, branding, or the carrying of weights for the purpose of discipline, or for producing penitence.*" And see—as to the carrying of a heavy log, as a punishment for military prisoners—Circ. No. 4, (H. A.,) 1887.

[2] Army Act § 44.

[3] Army Act § 133, (2.)

[4] See McArthur, Table of Trials in Appendix; Hough, 80, 91, 99, 100, 103, 105, 110, 147-8, 643-4; Id., (P.) 3, note; Col. Quentin's Trial, Table op. p. 218; Grant *v.* Gould, 2 H. Black., 72; Warden *v.* Bailey, 4 Taunton, 67.

In consequence no doubt of these extreme proceedings, and the fact that the employment of this punishment, subject as it was to abuse, became the occasion of suits in which heavy damages were recovered,[2] the authority to resort to the same was gradually restricted by the Mutiny Act till, in 1832, the maximum was fixed at 200 lashes.[3] In 1868 it was abolished for time of peace, and in 1881 altogether, (except as above indicated.) As a penalty to be resorted to in moderation, it has not been without its advocates among English writers.[4] In the *American* service, after the Revolution,[5] comparatively few sentences of flogging were adjudged[6] until after the punishment had been revived for deserters in 1833, when the same was frequently resorted to,[1] especially during the period of the Mexican war. By reason of the legislation of August, 1861, it was scarcely employed in our late war. An instance of a sentence, approved, of fifty lashes is found in a General Order of July, 1861:[2] a similar one adjudged by court-martial in February, 1862, (the last case of the kind discovered by the author,) was disapproved by the reviewing authority on account of the previous abolition of the punishment.[3]

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[1] See Napier, 150–1, 159–60, 163–4; Stocqueler, (Hist, Brit. Army,) 295–6; Gov. Wall's Case, 28 Howell S. T., 57, 157; De Hart, 244–247.

[2] Grant *v.* Gould, Warden *v.* Bailey, Gov. Wall's Case—*ante;* Comyn *v.* Sabine, 1 Cowper, 169.

[3] Clode, 1 M. F., 155.

[4] McNaghten, 222–232; Harcourt, 28–9, 31; Napier, 188; Clode, 1 M. F., 155.

[5] During the Revolutionary War, this punishment was not unfrequent. Thacher's Military Journal, 182–183. In G. O., Hdqrs., Valley Forge, March 25, 1778, a soldier, convicted of attempting to desert to the enemy, is sentenced "to receive 100 lashes, 50 per day, two days successively," and "to be well washed with salt and water after he has received his last fifty." The Commander-in-chief, (Washington,) approves, and orders the execution of the sentence "to-morrow a. m., at the head of his regiment."

[6] See instances in G. O. of May 9, May 31, Aug. 11, and Dec. 26, of 1809; Do. of Nov. 5, 1811. These are in the interval between the enactment of the code of 1806, and the original abolition of the punishment in 1812. In the case of Col. Wm. King, 4th Infy., (G. O. of Feb. 7, 1820,) one of the offences of which the accused was convicted

Branding or Marking—***As now prohibited.*** This punishment, as heretofore remarked, is prohibited by Art. 98, which is but a reiteration of the provision of sec. 2 of the Act of June 6, 1872, (the only previous legislation on the subject,) by which it was declared that—"*hereafter it shall be illegal to brand, mark, or tattoo on the body of any soldier by sentence of court-martial.*" This provision is inadvertently repeated in Art. 38. Marking in the *British* service was abolished in 1871.

As heretofore administered. The marking of deserters with the letter "D" dates from the Roman law,[4] and was authorized by the British Mutiny Act at an early date.[5] Later, that Act also authorized the marking of offenders discharged with ignominy, with the letters "B. C." (Bad Character.[6])

In our service this punishment has been carried considerably farther, additional forms of it having been sanctioned by usage.

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was the approving and executing of sentences imposing flogging, in violation of the Act of 1812. In 1832, Lt. Col. Woolly was sentenced to dismissal, on conviction, (with other offences,) of illegally flogging a soldier. IV Am. S. P., Mil. Af., 850, 854.

[1] In G. O. 45 of 1841, Gen. Scott mitigates several sentences of fifty lashes with a "*cowskin*" to thirty, on the ground that the "instrument" named is deemed much severer than a "cat o'nine tails."

[2] G. O. 32, Dept. of Washington.

[3] G. O. 16, Dept. of Kansas. Similar action was taken about the same time, in G. O. 31, Dept. of the Mo., 1862, in a case tried by military commission. And see case in G. C. M. O. 64 of 1865, noted under "Disciplinary Punishments," *post.*

[4] Vegetius, De Re Militari, p. 1, c. 8.

[5] The marking, as adjudged by the court-martial, was required, by an army regulation, "invariably to be performed under the personal superintendence of a medical officer."

[6] Simmons § 119, note.

Soldiers have been sentenced to be branded, as well as marked,[1] with D, both for desertion and for drunkenness. The mark has commonly been placed on the hip,[2] but sentences to be branded on the cheek[3] and on the forehead[4] have been adjudged. Other markings imposed by our courts have been H D for habitual drunkard,[5] M for mutineer,[6] W for worthlessness,[7] C for cowardice,[8] I for insubordination,[9] R for robbery,[10] T for thief.[11] Sometimes also entire words were required to be marked as "Deserter,"[12] "Habitual Drunkard,"[13] "Mutineer,"[14] or "Swindler."[15] The branding was done with a hot iron; the marking with India ink or gunpowder, usually pricked into the skin or tattooed.

This species of punishment, except in so far as necessary or expedient in cases of *deserters*, was repeatedly during the late war unfavorably commented upon by Judge Advocate General Holt as being "against public policy" and "not conducive to the best interests of the service." These views were repeated by other authorities, until Congress took the matter into consideration, and at length, by the enactment already cited, prohibited such punishment altogether.

Military prisoners, however, convicted of escape or attempted escape from the late Military Prison (now "U. S. Penitentiary") have been frequently sentenced, (in connection with other penalties,) "to have the letter E marked upon their clothing."[1]

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[1] The branding, however, was of rare occurrence compared with the marking..

[2] "To be marked with the letter D on his right hip" is recognized as a legal penalty, as adjudged by sentence of a *naval* court-martial, in 9 Opins. At. Gen., 80. In a case in an Order of April 4, 1833, a soldier is sentenced to be marked with D "on both thighs."

[3] G. O. 65, Dept of the East, 1864. Here the sentence is *mitigated* by the reviewing authority to a branding on the hip.

[4] G. O. of Feb. 1, 1814.

[5] G. O. 35 of 1838; Do. 31, Army of Occupation, 1846.

[6] G. O. 81 of 1833; G. C. M. O. 513 of 1865.

[7] See Order last cited; also G. O. 66, Dept. of Washington, 1866; Do. 14, Dept. of the East, 1868.

[8] G. C. M. O. 107, 115, 126, of 1865.

[9] S. O. of Jany. 6, 1862

[10] G. O. 45, Dept. of So. Ca., 1866.

[11] G. O. 2, Dept. of the East, 1868; Do. 6, First Mil. Dist., 1868.

[12] G. O. 25, 48, of 1827; Do. 29 of 1835.

[13] G. O. 25 of 1827.

[14] See Order last cited.

[15] G. O. 59 of 1826; Do 34 of 1827.

Disused Punishments[2]—***Carrying weights.*** Among the more usual of the punishments by sentence, now practically disused, was the carrying of weights, which consisted mostly in marching for a certain time, in front of the guard-house, on the parade, on a ring, &c., carrying a loaded knapsack, (loaded with brick, sand, &c.,) a log, a fence-post, or other weighty article; the weight, (commonly 25 or 30 lbs.,) being generally prescribed in the sentence.[3]

Wearing of irons. This has been in some cases so imposed in the sentence as to amount to a distinct punishment. The following forms may be cited from the General Orders:—"To be well ironed with handcuffs and leg-irons,"[4] (in connection with confinement;) To be confined "in double irons;"[5] "To be sent to his regiment in irons;"[6] "To be sent in chains to the Dry Tortugas."[7]

Shaving of the head. This has already been noticed as imposed in some instances as a mark of ignominy in connection with Dishonorable Discharge. The sentence has sometimes directed that the head be "half-shaved;"[1] also, that it be "close-shaved" and a "pitch canvas cap" worn upon it.[2]

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[1] Recent instances appear in G. C. M. O. 24, 26, 30, 64, 79, 82, 85, of 1893.

[2] None of the punishments indicated under this head are mentioned in the list of legal punishments for soldiers contained in par. 1019, Army Regulations. Viewing this paragraph, however, as applying strictly to time of *peace* only, some of these "disused" penalties may perhaps properly be revived in a time of *war*.

[3] In a recent order—G. C. M. O. 10, Dept. of the Mo., 1885, the Dept. Commander, (Gen. Augur,) in disapproving so much of a sentence as required *walking in a ring and carrying a log*, adds:—"Such punishment is a great waste of man power; something useful ought to be found for prisoners to do instead of such idle exercise." See Circ. No. 4, (H. A.,) 1887.

[4] G. O. 72 of 1832.

[5] G. O. 103 of 1832. "Double irons" have been much more frequently employed in the Navy, in cases in which the confinement has to be executed on board a vessel.

[6] G. C. M. O. 173, 195, of 1864.

[7] G. O. 33, Northern Dept., 1864.

Placarding. Standing or marching for a certain time bearing a placard or label inscribed with the name of the offence—as "Deserter," "Coward," "Mutineer," "Marauder," "Pillager," "Thief," "Habitual Drunkard"—was at one time a not uncommon punishment. In some cases the inscriptions were more extended—as "Deserter: Skulked through the war;"[3] "A chicken-thief;"[4] "For selling liquor to recruits;"[5] "I forged liquor orders;"[6] "I presented a forged order for liquor and got caught at it;"[7] "I struck a non-commissioned officer;"[8] "I robbed the mail—I am sent to the penitentiary for 5 years;"[9] "The man who took the bribe from deserters and assisted in their escape."[10]

Standing on a barrel, &c. Soldiers have been not unfrequently sentenced, for minor offences, to stand on the head of a barrel for certain periods, sometimes also bearing a placard. Another punishment by the use of a barrel was—"to carry a barrel with his head through a hole in one end, and resting on his shoulders."[11]

Other punishments. Less usual were such punishments as the following:[12]—Riding the wooden horse,[13] (sometimes with hands tied behind the person, or a musket tied to each foot;) Wearing a wooden jacket; Wearing an iron collar or yoke;[1] Wearing party-colored clothes, or Marching with coat turned wrong side out; Bucking; Picketing; Tarring and feathering;[2] Pillory;[3] Stocks; Gagging; Fasting; Tying up by the thumbs; Stopping "grog," or "ration of whiskey."[4]

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[1] G. O., Seventh Mil. Dist., Jan. 22, 1815; G. C. M. O. 23 of 1867; Do. 6, 36, of 1868.

[2] G. O. of Feb. 1, 1814. Compare Ordinance of Richard I, in Appendix.

[3] G. C. M. O. 451 of 1865.

[4] G. O. 23, Dept. of the Pacific, 1866.

[5] G. C. M. O. 7, Army of the Potomac, 1865.

[6] G. O. 15, Dept. of Va. & No. Ca., 1865.

[7] G. O. cited in note 3.

[8] G. O. cited in note 3.

[9] G. C. M. O. 58 of 1866.

[10] G. O. 76, Dept. of the East, 1864.

[11] G. O. 8, Dept. of the West, 1861; G. C. M. O. 58 of 1866.

[12] Of these punishments, "bucking" and "tying up by the thumbs," have been specially condemned as "not warranted by law or usage." See G. O. 80 of 1842; Do. 3 of 1853; Do. 44, Dept. of the Platte, 1871; Do. 1, Dept. of the South, 1873.

[13] This punishment is prescribed in Arts. 43 and 49 of Gustavus Adolphus, and Arts. 30 and 34 of James II.

VII. REMARKS WITH SENTENCE.

As has been indicated in the last Chapter, a court-martial may, in connection with its Sentence, as with its Finding,[5] present such animadversions, recommendations, explanations, or other remarks, as it may deem properly to be called for. Thus it may comment unfavorably upon the accuser or prosecutor;[6] may recommend that an officer or soldier, (other than the accused,) compromised by the evidence, be brought to trial;[7] may reflect upon certain action, discipline, or want of discipline, developed by the testimony, &c. It is not uncommon for a court, in adjudging an unusually mild sentence, to add that it is "thus lenient" on account of certain circumstances mentioned—as that the accused has undergone a long confinement in arrest before trial, or has borne a good character or rendered valuable services prior to his offence, or has voluntarily surrendered himself from desertion, or has been captured and imprisoned by the enemy, or is young or inexperienced as a soldier, or physically or mentally deficient, &c.[8] So the court may explain an exceptional sentence by a statement of its conclusions from the testimony, or an expression of its estimate of the amount of criminality involved in the case, or otherwise.[1] But in general it will be more military and dignified on the part of the court to abstain from any remarks which may have the effect of an excuse rendered for its action. Where some material proceeding, or the general course of proceeding, has been unusual, but justified by the peculiar character of the case, it will not be objectionable for the court to state the reason for the same in connection with the sentence. As was done by the court on the trial of Lt. Col. Fremont, where the great mass of evidence admitted was accounted for on the ground that, in view of the variety and complication of the circumstances surrounding the alleged offences, it was deemed proper to allow the fullest scope to the defence.[2]

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[1] A comparatively recent instance of this punishment, to wit—"to wear an iron yoke weighing nine pounds, with three prongs six inches long," is found in G. O. 38, Army of the Potomac, 1861.

[2] Imposed in connection with Dishonorable Discharge. See instances in G. O. 34 of 1827; Do. 29 of 1835.

In the Ordinance of Richard I. (see Appendix,) it is prescribed that one convicted of theft "shall have his head cropped * * * and boiling pitch shall be poured thereon, and then the feathers of a cushion shall be shaken out upon him."

[3] Abolished as a punishment for *civil* crimes by Act of Feb. 28, 1839, c. 36, s. 5.

[4] G. O. of April 19, 1814; Do. of June 7, 1817.

[5] See Chapter XIX.

[6] G. O. of 1853. See Chapter XIX—"Additions to the Finding."

[7] G. O. 45, Dept. of Washington, 1866.

[8] See G. O. 20, Dept. of the South, 1866; Do. 115, Dept. of the Mo., 1867; Do. 47, Dept. of the Lakes, 1868; Do. 8, Dept. of Arizona, 1874; G. C. M. O. 10 of 1883; Hough, 488.

Recommendation. Where a severe sentence, made imperative by a mandatory provision of the code, has been adjudged by the court, or—though more rarely—where a severe discretionary sentence has been imposed, the members, or a portion of them, sometimes join in a *recommendation*, *i. e.* a written statement commending the accused, for reasons stated, to the clemency of the reviewing authority.[3]

This statement is not a proceeding of the court, and no part of the record of the trial. It is therefore not properly incorporated with or added to the sentence,[4] but, in practice, is usually appended to the record as a separate paper. It may indeed form the subject of a distinct official communication to the reviewing commander or pardoning power, and this is the form which it usually takes in the French and German procedure.[5]

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[1] See the explanations of the sentences of admonition and reprimand in G.O. 250 of 1863; G. C. M. O. 212 of 1866.

[2] Printed Trial, p. 338.

[3] Unfavorable recommendations—as that the accused be dismissed or discharged, though recognized in the British, (see Hough, (P.,) 762; Hughes, 99; Bombay R., 41,) can scarcely be said to be sanctioned in our practice.

[4] See Army Regs., par. 1040. So, in the civil practice, a recommendation to mercy by a jury is no part of the verdict, but only a communication addressed to the judge. People *v.* Lee, 17 Cal., 76.

[5] In Marshal Bazaine's Case, in 1873, after the court had agreed upon the death sentence, seven of the ten members addressed a communication to the President of the Republic recommending a commutation of the punishment, which was commuted accordingly to twenty years' imprisonment in a fortress.

Being the act, not of the court, but of the members who take part in it,[1] the recommendation may be subscribed by all the members, or by a majority or minority, or by one member only. There may be two or more recommendations, signed by different members, and on different expressed grounds.[2] The judge advocate may properly join in a recommendation.

A recommendation should not omit to state the reasons upon which it is based.[3] Among the grounds generally advanced have been—the previous military services of the offender, his general good character, his youth or inexperience, the fact that he has been held for an unusual period in arrest or confinement awaiting trial, or that he is in infirm health, the absence in his case of a deliberate criminal intent, &c. A recommendation should proceed upon *facts*—mainly or entirely upon facts in evidence on the trial. It should not be actuated by the personal feelings of the members, whether feelings of partiality toward the accused or of disfavor toward the prosecutor.[4] It should of course not disclose opinions on the question of guilt or innocence.[5] Further, it should not assume to dictate, or to suggest, to the reviewing authority what mode or measure of clemency will properly be resorted to in the case.[6]

It seems to be the sentiment of the authorities that recommendations are not much to be encouraged.[7] They have indeed been characterized in some instances rather by a weakly lenient or temporizing spirit than a sound appreciation of the circumstances or merits of the case; in others they have been so materially inconsistent with the findings and sentence as to detract materially from their weight. In a proper case, however, a recommendation, especially if signed by all the members, will be duly deferred to, as being in effect a qualification of the sentence.

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[1] "Only those members who concur in the recommendation will sign it." Army Regs., par. 1040. And see DIGEST, 638.

[2] In a late case, in G. C. M. O. 92 of 1875, there were two separate recommendations, one being signed by a single member.

[3] In a case in G. O. 70, Dept. of Dakota, 1870, it is remarked by the reviewing officer, Gen. Hancock, as follows:—"As the members of the court are silent with regard to the considerations by which they were influenced in making their recommendation in the prisoner's behalf, it is impossible for the reviewing authority to determine whether their reasons for making the recommendation were sufficient to justify a mitigation of the sentence. No consideration can, therefore, be paid to it." And see G. O. 27, Div. of the Atlantic, 1874; Hough, (P.,) 793.

[4] See James, 619.

[5] See Benét, 145.

[6] James, 527, 528; Simmons § 698; Kennedy, 211; De Hart, 198; Coppée, 85.

[7] The Secretary of War is "surprised to find that any officer of the court could recommend remission or commutation of the sentence in a case where the conduct of the officer tried was as reprehensible as that

VIII. DISCIPLINARY PUNISHMENTS.

Not Authorized by Law. The different specific penalties which have been considered in this Chapter practically exhaust the power to punish conferred by our military law. We have in that law no such feature as a system of disciplinary punishments[1]—or punishments imposable at the will of military commanders without the intervention of courts-martial—such as is generally found in the European codes. Except so far as may be authorized for the discipline of the Cadets of the Military Academy,[2] and in the cases mentioned in two or three unimportant and obsolete Articles of war,[3] our law recognizes no military punishments for the Army, whether administered physically, or

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of" the accused. G. C. M. O. 92 of 1867. "The practice of the members of a court-martial first finding an officer guilty, and then recommending him for clemency, is to be deprecated. It is an endeavor, too frequently made, to transfer the responsibility of their finding to the Department of War when it should rest upon the court itself." G. O. 36 of 1843. And see Do, 39 of 1845; Do. 26 of 1851; Do. 342 of 1863; G. C. M. O. 27 of 1871.

[1] It is quite otherwise in the Navy. See Art. 24 of the code of Articles for the Government of the Navy, Rev. Sts., Sec. 1624. In the British Navy, where a similar authority exists, "courts-martial," according to Clode, (M. L., 44,) "are seldom resorted to." The power of summary punishment accorded to naval, but denied to army, commanders, is analogous to the authority to chastise or punish disorderly and disobedient seamen in the merchant service. See Turner's Case, 1 Ware, 77; Bangs *v.* Little, Id., 520.

As to the summary power of disciplinary punishment now vested in commanding officers of the army in the British Law, see Manual, 35, 36; Army Act, ss. 46, 138, Queen's Regs., Sec. VI.

[2] See Regulations of the Military Academy § 107, 108.

[3] Arts. 25, 52 and 53. The nearest approach, however, to a disciplinary punishment in our law is the reducing of non-commissioned officers by *order*, under par. 172, Army Regulations. But this may be resorted to for purposes quite other than punishment.

by deprivation of pay,[1] or otherwise, other than such as may be duly imposed by sentence upon trial and conviction.

Nor Sanctioned by Usage. By the authorities nothing is more clearly and fully declared than that *punishments* cannot legally be inflicted at the will of commanders—that they can be administered only in execution of the approved sentences of military courts.[2] Such punishments, whether ordered by way of discipline irrespective of arrest and trial, or while the party is in arrest awaiting trial, or between trial and sentence, or after sentence and while awaiting transportation to place of confinement, or while he is under sentence and in addition to the sentence,—have been repeatedly denounced in General Orders and the Opinions of the Judge Advocate General,[3] and forbidden in practice by Department commanders.[1] Officers who have resorted, or authorized inferiors to resort, to them have not unfrequently been brought to trial and sentenced, sometimes to be dismissed:[2] if acquitted or lightly sentenced, the proceedings have in general been disapproved or severely commented upon.[3] On the other hand, enlisted men tried and sentenced for insubordinate conduct, where such conduct has been induced or aggravated by illegal corporal punishments inflicted upon them by superiors, have commonly had their sentences remitted or mitigated, or altogether disapproved.[4]

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[1] See Circ. No. 14, (H. A.,) 1890.

[2] De Hart, 218; O'Brien. 487-8; DIGEST, 700; and Orders cited in succeeding notes.

[3] "No officer has the authority in any case to inflict punishment for past offences of any kind. This authority is possessed by courts only." J. C. Spencer, Sec. of War, in G. O. 4 of 1843. And see Do. 81 of 1822; Do. 23 of 1824; Do. 28 of 1829; Do. 25 of 1840; Do. 53, 80, of 1842; Do. 2 of 1843; Do. 39 of 1845; Do. 31, Div. of the Atlantic, 1873, (where to impose solitary confinement before trial is declared "clearly illegal;") Do. 1, Dept. of the South, 1873; Do. 23, Id., (where the inflicting of a punishment—without trial—on a soldier *when drunk* is especially disapproved by Maj. Gen. McDowell;) G. C. M. O. 90, Dept. of the East, 1871, (where a soldier, for disorderly conduct in ranks under liquor, was ordered to carry a fence-post, and on refusal was gagged and subsequently confined with ball and chain and in irons till brought to trial—action severely condemned by the same commander;) Do. 71, Dept. of Dakota, 1882; DIGEST, 364, 365. In G. C. M. O. 195, Dept. of Dakota, 1883, the requiring of a soldier, confined in the guard-house before trial, to perform unusual police work, was held unauthorized. In G. O. 53, Dept. of Va. & No. Ca., 1864, the striking, &c., of *colored* soldiers without sufficient cause is especially reprobated; these troops being docile and obedient if properly treated and set a good example. And compare case of Lt. Col. Broughton, an officer of a "black corps" in the West Indies, James, 261. See also G. O. 148, Navy Dept., 1869; Do. 168, Id., 1872; Do. 217, Id., 1876—where the transcending of the authority of summary punishment by naval commanders is severely commented upon by the Secretary of the Navy.

It may be noted here that, by the authority of *express statute*—Sec. 1353, Rev. Sts.—*convicts* at the Leavenworth Military Prison, (now "U. S. Penitentiary,") offending against discipline, were sometimes subjected to solitary confinement; the system here being analogous to that of a penitentiary.

The practical result is that the only discipline in the nature of punishment that, under existing law, can in general safely or legally be administered to soldiers in the absence of trial and sentence is a *deprivation of privileges* in the discretion of the commander to grant or withhold, (such as leaves of absence or passes,) or an *exclusion from promotion* to the grade of non-commissioned officer, together with such discrimination against them as to selection for the more agreeable duties as may be just and proper.[1] To vest in commanders a specific power of disciplinary punishment, express legislation would be requisite.

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[1] G. O. 23, Dept. of the Lakes, 1870; Do. 44, Dept. of the Platte, 1871; Do. 7, Dept. of the Gulf, 1872, also Orders cited in last note.

[2] See G. O. of Feb. 7, 1820, (case of Col. Wm. King;) Do. of June 30, 1821, (case of Col. Talbot Chambers, sentenced to suspension for inflicting illegal punishment in "cropping" the ears of two soldiers;) Do. 23 of 1824; Do. 8, 20, of 1826; Do. 28 of 1829; Do. 25, 47, of 1830; Do. 64 of 1832; Do. 34 of 1842, (Capt. Howe's Case;) Do. 2, 4, 17, of 1843; Do. 39 of 1845; G. C. M. O. 645 of 1865; Do. 112, Dept. of the East, 1870: Do. 53, Dept. of Va. & No. Ca., 1864; Do. 9, Div. of the Atlantic, 1869; Do. 14, Dept. of the South, 1869; G. C. M. O. 50, Dept. of the Mo., 1871; Do. 30, Id., 1883; Do. 37, Dept. of Texas, 1880; Do. 5, 6, Id., 1885; Do. 2, 6, Dept. of Arizona, 1883; G. C. M. O. 1, Div. of the Mo., 1890; Hough, 465; Id., (P.,) 400. And see G. O. 168, Navy Dept., 1872; Do. 217, Id., 1876. Note also, in this connection, the case in G. C. M. O. 64 of 1865, of a Brig. Gen., convicted of causing two soldiers to be flogged with 39 lashes each, as a disciplinary punishment, and sentenced to suspension. The findings and sentence were however disapproved.

[3] G. O. 4, 64, of 1843; Do. 2 of 1844; Do. 39 of 1845; Do. 22, Dept. of the Platte, 1867; G. C. M. O. 112, Dept. of the East, 1870. And see G. O. 9; Div. of the Atlantic, 1869; Do. 5, Id., 1870; G. C. M. O. 29, Dept. of the Mo., 1890.

[4] See G. O. 49, 76, Northern Dept., 1864; Do. 40, Dept. of the East, 1868; G. C. M. O. 90, Id., 1870; G. O. 63, Dept. of Dakota, 1868; Do. 76, 106, Id., 1871; Do. 93; Dept. of the South, 1873. And see cases specified in Am. S. P., Mil. Af., vol. II, p. 38–41.

Summary Discipline in cases of Emergency. Cases will indeed sometimes arise in the military service when a superior is called upon to employ toward an inferior a degree or quality of force not in general permissible. As where he is required to defend himself against an assailant, to suppress a mutiny, to quell a dangerous offender or quiet a turbulent one, to overcome resistance made to an arrest, to secure a soldier attempting to desert, or to capture a prisoner escaping from custody:—in such instances the superior may in general resort to the necessary personal force, use of arms, imprisonment, ironing, or other available form of constraint,[2] and in *extreme* cases may even be warranted in taking life.[3] Especially in time of *war*, and when the command is before the enemy, will such forcible and vigorous measures be justified.[4] This, however, is *repression* and *restraint*, not *punishment;* no greater force or more severe restriction is therefore to be employed than may be reasonable and needful under the circumstances; and where the commander is provided with the usual or with adequate facilities for apprehending and confining an offender with a view to trial, he is not, even in time of war, to inflict personal chastisement upon him or subject him to any arbitrary punitory treatment, much less, by the use of arms, to put him in danger of his life.[5] In violating these rules the superior subjects himself to charges and trial by court-martial,[1] as well as to civil suit or prosecution.[2]

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[1] See G. O. 7, Dept. of the Gulf, 1872.

[2] See G. O. 81 of 1822; Do. 53 of 1842; Do. 2, 4, of 1843; Do. 21 of 1851; Do. 3 of 1853; G. C. M. O. 47 of 1877; Do. 53, Dept. of Va. & No. Ca., 1864; Do. 40, Dept. of the East, 1868; G. C. M. O. 112, Id., 1870; Do. 90, Id., 1871; G. O. 23, Dept. of the Lakes, 1870; Do. 106, Dept. of Dakota, 1871; Do. 1, 93, Dept. of the South, 1873; Do. 31, Div. of the Atlantic, 1873; G. C. M. O. 37, Dept. of Texas, 1880; Do. 23, Dept. of Arizona, 1891; DIGEST, 701.

[3] G. C. M. O. 47 of 1877; G. O. 29, Dept. of N. E. Va., 1861, Do. 5, Dept. of N. Mexico, 1863; Do. 54, Dept. of So. Ca., 1865; Do. 25, Dept. of La., 1866; U. S. *v.* Carr, 1 Woods, 484; DIGEST, 486–7.

[4] DIGEST, 487; Clode, M. L., 117, 118.

[5] G. O. 54, Dept. of So. Ca., 1865; Do. 40, Dept. of the East, 1868; G. C. M. O. 112, Id., 1870, (Remarks of Maj. Gen. McDowell;) G. O. 5, Div. of the Atlantic, 1870; G. C. M. O. 45, Dept. of Dakota, 1880. See also Do. 93 of 1867; Do. 36 of 1880; DIGEST, 701. And compare cases at maritime law—as Turner's Case, Ware, 77; U. S. *v.* Freeman, 4 Mason, 505; Perkins *v.* Hill, 1 Sprague, 119.

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[1] "An excess wantonly committed would itself be punishable in the superior." Maj. Gen. Scott, in G. O. 53 of 1842. And see cases in Orders cited in the previous notes under this head.

[2] See PART III, "Amenability to Criminal Prosecution in State Courts," where, among other adjudications, is noticed the recent (1892) remarkable case of Commonwealth *v.* Hawkins and Streator, in which certain commanding officers of the Pennsylvania militia, indicted for assault and battery in summarily disciplining a private (W. L. Iams,) by tying him up by the thumbs, shaving his head, and drumming him out of camp, for a trifling offence—the use of foolish words savoring of insubordination, but unaccompanied by acts—are held justified and acquitted!

CHAPTER XXI.

ACTION ON THE PROCEEDINGS—THE REVIEWING AUTHORITY.

The next Requisite. While the function of a court-martial is, regularly, completed in its arriving at a sentence or an acquittal, and reporting its perfected proceedings, its judgment, so far as concerns the *execution* of the same, is incomplete and inconclusive, being in the nature of a *recommendation* only. The record of the court is but the report and opinion of a body of officers, addressed to the superior who ordered them to make it, and such opinion remains without effect or result till reviewed and concurred in, or otherwise acted upon, by him.[1] This superior, sometimes referred to as the Approving or Confirming Authority, but more commonly known in military parlance as the Reviewing Authority or Officer,[2] is, as will presently be more fully indicated, the official—military commander or Commander-in-chief—by whom the court was originally constituted and convened, or—where there has been a change in the command since the convening—his successor therein. In some cases indeed where, beside the approval of the original commander, further confirmatory action by a higher commander or the President is required by law, there are in fact, as will also be pointed out, two separate reviewing officers.[3] It is the function of such officer (or officers) which we now proceed to consider.

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[1] See Tytler, 163, 169, 227; Kennedy, 212, 217; Simmons § 709; Macomb, 33; 5 Opins. At. Gen., 511. A sentence is "interlocutory and inchoate" till duly approved. Mills *v.* Martin, 17 Johns., 30; Runkle *v.* U. S., 122 U. S., 555.

[2] The term "Reviewing Authority" occurs in Sec. 1228, Rev. Sts.

[3] In the case of *In re* Esmond, 5 Mackey, 74, the court, having in view the commanders, as well as the Judge Advocate General, by

The Law on the Subject.[1] The provisions of our statute law which relate to the authority and action of the "Reviewing Officer," in the approving and confirming, &c., of sentences and judgments, and in the executing, pardoning and mitigating of punishments, are contained in Articles 104 to 112 of the code, and—as to the execution of the sentences of courts for the trial of Cadets—Sec. 1326, Rev. Sts. These provisions, with a few Army Regulations and some usages of the service relating chiefly to the return of proceedings to the court for correction, the formulating and publication of the final action taken thereon, and the ultimate disposition of records of trials, constitute the law on the subject of this Chapter. Art. 110, and the Act of October 1, 1890, (relating to summary courts,) which refer to the action on sentences of Inferior Courts, will be more specifically noticed in Chapter XXII. The matter of the execution of *particular punishments* has already been remarked upon in the preceding Chapter. Except as thus treated, the present subject will here be examined under the heads of—

I. Approval or Disapproval of the proceedings.
II. Return of the proceedings for correction.
III. Action of the President as confirming authority.
IV. Action of commanding general as confirming authority.
V. Execution of sentences.
VI. Suspension of execution of sentences.
VII. Pardon and mitigation of punishments.
VIII. Formulating of action and promulgation.
IX. Disposition of records.

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whom the proceedings are passed upon, well observes that Congress has provided, in addition to the court-martial, a "separate and complete line of reviewing authorities terminating in the Executive."

[1] By the earlier statutes—Art. 67 of 1775; Arts. 8 of Sec. XIV and 2 of Sec. XVIII, of 1776; Resolutions of April 14, May 27 and June 18, of 1777; Art. 2 of 1786, and Arts. 65 and 89 of 1806—the general in chief, and subsequently the general commanding in the State, and the commanders of separate departments and armies, were authorized to act, (with some limitations hereafter to be noticed,) as reviewing officers. Prior, however, to the adoption of the Constitution, Congress itself, in which then resided the executive power of the government, not unfrequently exercised the power of finally acting upon the proceedings of general courts-martial and of remitting and mitigating their sentences. See 2 Jour. Cong., 69, 195; 3 Id., 5, 37, 144, 158, 210, 223, 386, 433, 714; 4 Id., 255, 259, 268, 367.

I. APPROVAL OR DISAPPROVAL OF THE PROCEEDINGS.

Approval—*Art. 104.* Upon this subject this Article provides as follows: "*No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer ordering the court, or by the officer commanding for the time being.*"

The approval by the proper superior is thus seen to be as necessary to the operation of the sentence as is the judgment of the court which awarded it. It is indeed the final, conclusive, official act in the absence of which the judgment would remain as a mere award without sanction or efficient quality.[1]

Significance of term "Approved." This word, as technically construed in practice, designates the fact of the *official* acceptance of and concurrence in the proceedings or sentence by the reviewing authority. Art. 109 uses the word "confirmed" as describing the ratification of the *sentence*, and it would indeed be in general more strictly precise to speak of the proceedings (except the sentence) as approved, and of the sentence as confirmed.[2] In practice, however, no essential difference in meaning is recognized between the two terms, "approved" and "confirmed,"[3] but both are often indifferently employed in reference to the sentence. Inasmuch, however, as "confirmed" is the word used in Arts. 105–108 to describe the action of the President, (or other superior authority,) in cases where his action is required upon the sentence. in addition to that of the original reviewing authority, this term has come to be more commonly reserved for the designation of such action, while "approved" is more usually employed to indicate the action of the original commander—the commander of the department for example—by whom the court was ordered, (or his successor, if there has been a change in the command.) The two terms will accordingly thus be distinguished in this Chapter, and generally throughout this treatise.

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[1] "The effect and conclusiveness of any action of the court stands as much upon the reviewing officer's approval and order as upon the original proceedings and sentence of the court. The two constitute an entire proceeding and are to be considered together." *In re* Esmond, 5 Mackey, 70.

[2] In some cases the expression "approved *and* confirmed" has been adopted in passing upon proceedings and sentence together, but this has been more common in the British service, (see James' Precedents,) than with us.

[3] O'Brien, 277; De Hart, 111–112.

In exceptional cases, reviewing officers, in acting upon a sentence have declared of the same that it was "confirmed but not approved," the intent being to impart the mere official assent necessary in law to the execution of the sentence while withholding personal approbation of the same or of the proceedings or findings upon which it is based. Such a distinction, however, in giving to the two words the one a technical and the other a colloquial meaning is a departure from established usage and without *legal* significance.[1]

Approval as an Essential. Approval is necessary, not only to vitalize the sentence as such, but to give it substance as material upon which further official action can be predicated. By Art. 104 the official approval of the convening commander, (or his successor,) is made an essential requisite to the taking effect of the sentence, both in cases where such approval is final and conclusive *per se*,[2] and in those where further action is necessary to supplement it. In other words, approval is equally essential where the sentence, in order to be executed, requires the subsequent confirmation of superior authority, (as in the cases specified in Arts. 105–108, and Sec. 1326, Rev. Sts.,) as where the same is fully executed by the act of the original commander alone.[3] It is, similarly, a prerequisite to the suspending of the sentence for the action of the President under Art. 111, as also to the exercise of the pardoning power by him, or by a commander under Art. 112.[4] Unless the sentence has been previously duly approved, and has thus a legal existence, it cannot, nor can any punishment included in it, be either remitted or mitigated.

It may be observed that while an approval is necessary to give effect to a sentence, it cannot validate what is in itself invalid and inoperative. Thus an illegal sentence—as a sentence adjudged by a court without legal existence—cannot be cured or rendered operative by the approval of a commander or of the President.[1]

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[1] Simmons, (§ 730,) observes of the term "confirmed but not approved," that its "legal effect differs in no degree from an approval."

[2] See *post*—"V. Execution of sentences."

[3] G. O. 27, Army of the Potomac, 1863.

[4] G. C. M. O. 101, Division of the Atlantic, 1874; Do. 66, Dept. of Cal., 1885.

By Whom to be Approved. The Article requires the approval of the sentence by "the officer ordering the court," or "the officer commanding for the time being."

"The officer ordering the court." This is of course the officer, (President or military commander,) who, by virtue of the authority vested in him by the law as already considered in Chapter VI, on the Constitution of General Courts-Martial, has originally convened the court by which the sentence has been adjudged. In the great majority of cases he is the official by whom the sentence is approved or otherwise acted upon.

Extent of his discretion. Whether and how far the proceedings and sentence, or any part of the same, shall be approved, &c., is a subject wholly within the discretion of such officer. As to this he is invested by the Article with the sole authority, and cannot therefore be directed either by the President or other superior. While deferring to any known views of a superior as to any question of law or discipline involved in the particular case, it is yet his duty as it is his right, in the exercise of the power of approval or disapproval, to act according to his own best judgment, and in the light of the facts and the law as understood and held by himself.

Delegation of his authority. This officer must act personally. He cannot delegate his function as reviewing authority to another officer—as a staff officer or an inferior commander—to act in his stead. If he assumes to do so, the acts of his delegate will be of no legal virtue.

Effect of his absence from command. While the personal presence of the commander within the territorial limits of his command may not be absolutely essential to give validity to his action as a reviewing officer, or the mere fact of his absence therefrom sufficient to invalidate such action,[2] yet where he is absent on a duty or under orders practically detaching him from his command, or the effect of which is, in a military sense, properly incompatible with its exercise, his power to act upon the sentences of courts-martial convened by him may be materially affected. Thus while a Department Commander, who has temporarily passed the boundary of his department when pursuing hostile Indians, or while engaged in some other military service as such commander, is not so absent from his command as to be disqualified from taking the action required by Art. 104 or 109, it may be quite otherwise where he is absent under orders placing him upon a distinct and separate duty of some continuance, or by virtue of a leave of absence for any considerable term.[1] Under any such circumstances, indeed, it will in general be safest to devolve the command temporarily upon some other officer, and for such officer to act as reviewing authority for the time being.

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[1] See Lieut. Cobb's Case. Am. S. P., Mil. Af., vol. 4, p. 854.

[2] 16 Opins. At. Gen., 679.

Effect of the absence of the accused. It cannot however affect the authority of the convening officer to approve, &c., the proceedings, that since the trial the accused may have been transferred with his company to another department, &c., or is otherwise absent from the command, as by reason of having been taken prisoner by the enemy or having deserted. The authority of the commander having once attached to the case, he still remains the reviewing authority whose formal approval is necessary to the execution of the sentence, though the matter of its actual enforcement may have to be directed by a superior or other commander.

"The officer commanding for the time being." This is an officer who, by reason of the absence, removal, disability, &c., of the officer who originally ordered the court, or the merger or discontinuance meanwhile of his command, has succeeded to the exercise of such command and is exercising the same at the time when the proceedings and sentence are completed and require to be acted upon. Such officer will usually have been temporarily or indefinitely detailed for the command by the President, (or other superior;) but, where no such formal detail has been made, and none is required by statute or regulation to be made, he may be an officer upon whom the command has devolved by reason of his seniority in rank according to the usage of the service. Upon duly assuming the command "for the time being," such officer succeeds to all the rights of review and action which would have been possessed by the convening authority had his exercise of the command not been interrupted.

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[1] G. C. M. O. 26 of 1878; Do. 9, Dept. of the Columbia, 1880.

It may be noted that the rank of such successor is not fixed by the Articles, and it cannot therefore be held to be essential that he should be of equal rank with the officer who convened the court, or of a rank sufficient to authorize him himself to convene such a court. Thus a department or an army commander, to be empowered to assemble a general court under Art. 72, must be a general or a colonel, but "the officer commanding for the time being," in the absence of any requirement as to his rank, may legally and effectually act upon and approve the proceedings though,—as might be the case in time of war,—his rank be less than colonel.

Where, pending the proceedings in a case on trial, the command of the convening officer has been discontinued and included in a larger or other command, as where one department has been merged in another or in a Division, the commander of the latter will be the authority answering to the description of "the officer commanding for the time being," and will properly act upon the proceedings and sentence as indicated in Arts. 104 and 109. Where, under similar circumstances, the command of the convening officer has been discontinued altogether without being renewed in any form or included in another command, the General, if any, duly assigned by the President to the command of the army, will be "the officer commanding for the time being," or, if there be no authorized military commander of the entire army, the President himself as constitutional Commander-in-chief.[1]

"The officer commanding for the time being" is invested with the same authority and discretion, and held to the same obligation, in the exercise of the power of approval, &c., as would be "the officer ordering the court" in whose stead he acts.

Disapproval—***Its nature and effect.*** "Disapproval," in military law, is not a mere expression of disapprobation,[2] but a technical term employed to indicate the action of the reviewing officer where he does *not approve* the sentence or a punishment. Such officer, wherever authorized to approve, may, instead, disapprove; disapproval being simply the absence or withholding, stated in terms,[1] of the approval or confirmation which is necessary to the taking effect of the judgment of the court. As approval or confirmation vitalizes and makes operative the sentence or a punishment, disapproval nullifies and vacates it.[2] Like approval, it may be full or partial, *i. e.* where a sentence imposes several punishments, one or more may be disapproved, and the other or others approved; the disapproval of a part not affecting the validity or execution of the remainder.[3] Where the entire sentence is disapproved, the proceedings in the case are wholly terminated and nugatory; there remains therein no material upon which the original reviewing officer, or the President or other superior authority whose confirmation would be necessary to the enforcement of the sentence, can exercise the power of execution, or that of pardon or mitigation; and to transmit proceedings, for the confirmation of the sentence or other action by higher authority, when the sentence or judgment has been formally disapproved in the first instance, must be as futile as it is unauthorized. Upon such a disapproval also the accused is restored *ex vi* to his normal legal status as existing before his arrest, and is entitled to be at once released from any form of restraint to which he may have been subjected, and to be returned to the duties and rights of his rank or office; his legal rights and privileges remaining no more affected than if the trial had resulted in an acquittal.[4]

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[1] Martin *v.* Mott, 12 Wheaton, 34.

[2] As to the action, commonly classed as "disapproval," but which is no more than unfavorable comment upon proceedings of secondary importance, see *post*—"Disapproval not affecting the sentence."

Where the disapproval of the sentence is but partial, its effect is to nullify the punishment or punishments disapproved, leaving the other or others which are approved to be executed, remitted, or mitigated, precisely as if the sentence had included this or these only.

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[1] That it must be *express*, see DIGEST, 671; 16 Opins. of At. Gen., 312.

[2] G. O. 209, 341, of 1863; Do. 27, Army of the Potomac, 1863; O'Brien, 277; 1 Opins. At. Gen., 242; DIGEST, 671.

[3] See G. O. 72, Dept. of the East, 1865.

[4] "The effect of the disapproval is not merely to annul the sentence but also to prevent the accruing of any disability, forfeiture, &c., which would have been incidental upon an approval." DIGEST, 672. And see Circ. 12 of 1883. The disapproval is "tantamount to an acquittal by the court." 13 Opins. At. Gen., 460. That the fact of the disapproval does not divest the accused of the right to plead the acquittal or conviction in the event of a second arraignment for the same offence—see Chapter XVII—"Plea of Former Trial."

Grounds of disapproval. The grounds upon which the authority to disapprove a sentence or punishment may properly be exercised are mainly of two classes; some going to the legal validity or to the regularity of the proceedings, and others to the justice or expediency of allowing the judgment to stand or the sentence or punishment to be enforced. Thus where the court was not legally constituted or composed, or was without jurisdiction of the offence or offender, or proceeded with the trial when below the minimum of members; or where the record discloses irregularities which, though not amounting to fatal defects, are of a gross character; or where the accused has been denied material testimony, or otherwise prejudiced in his defence;[1] or the findings or a part of them are unwarranted by the testimony; or the sentence itself is inadequate to the offence, or too severe, or quite unmerited, or imposes a punishment not authorized by law,—in any such case the Reviewing Officer may, in his discretion, withhold his approval from, and formally *disapprove*, the sentence, in whole or in part, as the law or facts may require or render proper. His discretion indeed is here without restriction; its exercise does not depend upon the quality of his reasons: whether or not *any* reasons are stated by him, or whether his actual reasons are in point of fact good and sufficient, or the reverse, the disapproval is equally effective in law. At the same time he will, of course, not properly disapprove without good reason—without better reason than the court had for the action which he fails to approve. Where, for example, the evidence in the case was conflicting, and it is apparent that the court, having the witnesses before it, must have been the best judge of their relative credibility and of the weight of the testimony, it will in general be wiser for the Reviewing Officer to defer to, rather than disapprove, its conclusion.[2] Nor will he properly disapprove a sentence on account of a mere error on the part of the court which does not affect the merits or impair the final judgment—as, for instance, an improper rejection of testimony offered by the defence, which however would have added to the case no material facts.[1] Nor will he ordinarily disapprove where he can have the defect remedied by a *revision* by the court, as presently to be indicated.

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[1] See an instance in G. C. M. O. 43 of 1885.

[2] Capt. Weisner's case, Am. Archiv., 5th Series, vol. 2, p. 895; also G. O. 153, Dept. of Dakota, 1881; Opinion of Atty. Gen. Brewster in 18 Opins., 113. Similarly, upon an application for new trial in the criminal practice,—"if there be conflicting evidence on both sides, and the question be one of doubt, it seems the verdict will generally be

Approval or Disapproval of Proceedings other than Sentence. Art. 104, as has been seen, provides for an approval of the *sentence*, and in no other of the Articles is any other form of approval indicated. In practice, however, the Reviewing Officer approves also, or disapproves the "finding" or "proceedings," both in connection with or distinct from the sentence, if any. Where there is a sentence, he may, and often does, exercise the authority of disapproval as to some portion or portions of the proceedings not essential to support the sentence; such disapproval not being a determinate legal act like the other, but an expression of disapprobation or difference of opinion on the part of the commander. Thus he may, in his review, disapprove a ruling of the court upon an objection to evidence, or a ruling upon some interlocutory matter as a motion for a continuance, which, though erroneous, does not impugn the final judgment; or he may disapprove some statement or omission in the record, which, not being at variance with a statutory requirement, does not constitute a fatal defect. But this form of unfavorable comment is entirely consistent with a final approval of the sentence or of a punishment: a disapproval indeed of certain of the proceedings is often accompanied by an approval of the sentence or of a part of it.

Censure with Disapproval. The expression of a disapproval is sometimes and properly accompanied by animadversion upon the court,[2] the prosecution, the administration of a com-

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permitted to stand." Wharton, C. P. & P. § 813; also Wright *v.* State, 34 Ga., 110; Whitten *v.* State, 47 Id., 297.

[1] See G. O. 70, Dept. of So. Ca., 1865. In such a case the reviewing authority should in general simply express his disapprobation of the ruling, as indicated under the next head.

[2] See, for example, the recent instance in G. C. M. O. 56 of 1893. In this case, where the court, in finding the accused guilty of a duplication of pay accounts, sentenced him only "to be reprimanded," the Secretary of War observes—"That a court-martial, comprising officers

mand,[1] &c. Such comment has not unfrequently been added where the court, in the opinion of the reviewing authority, has failed to appreciate the gravity of the offence and awarded a too lenient punishment. Reviewing officers have also not unfrequently been induced to remark upon the very improper admission or rejection of testimony offered.[2]

Allowance of new trial, upon disapproval. It was held by Atty. Gen. Wirt, in the early case of Captain Hall,[3] that a reviewing officer, in disapproving a sentence, is authorized further, in his discretion, (for the allowance is not a matter of right,) to order a new trial of the accused; provided he specifically applies therefor, thus waiving his privilege under the provision against second trials for the same offence now contained in Art. 102. But, beside the new trial granted under these circumstances in the case of Hall, the similar instances in our service have been very few and rare,[4] and the subject of *new trial* is now one quite without material significance in our military law and need not therefore be dwelt upon. It is to be noted that it is only upon, and as an incident to, a disapproval of a sentence that the new trial can be allowed; after approval there can legally be no such proceeding.

Action where the accused is insane or imbecile. Here should be noticed the action to be taken in cases in which the

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of rank and experience, should so lightly regard the offences here fully established and found, is a reproach to the service, and the proceeding is in marked inconsistence with the duty of protecting and maintaining that high sense of personal honor which has long characterized the reputation of the army."

[1] "An examination of this case and that of" (another officer named) "tried by the same court-martial, has fully convinced me" (the President) "that a condition exists at Fort —— that must, if allowed to continue, result in scandal and demoralization." G. C. M. O. 27 of 1888.

[2] G. C. M. O. 37, 44, 84, Dept. of the Platte, 1892; Do. 78, Dept. of Dakota, 1892.

[3] 1 Opins. At. Gen., 233, (1818.)

[4] See instances in G. O. 18 of 1861; Do. 8, 9, 26, First Mil. Dist., 1869. "The privilege has naturally been but seldom exercised; parties convicted and sentenced being in general satisfied that the proceedings in their cases should be terminated by the disapproval, on whatever grounds the same may be based." DIGEST, 536.

accused is found by the court, or deemed by the reviewing authority himself, to have been at the time of the offence or the trial, or to be at the time of the review, mentally deranged or otherwise irresponsible. Where the accused was apparently insane, &c., at the commission of the offence, and the court, notwithstanding, have sentenced him, the reviewing officer will properly *disapprove* the sentence; and in such a case, or in one where the court has not proceeded to sentence, but the fact of insanity, &c., appears from the evidence, or the finding, or a recommendation of the members, he will in general properly discharge the accused, (under the 4th Article of war,) or recommend his discharge by superior authority, and take measures for his commitment, if the case warrants it, to the Government Asylum for the Insane. Where the insanity, &c., has developed since the commission of the offence, the reviewing officer will in general properly *approve and remit* the sentence, (if any,) with similar action as to discharge, &c.; first, if desirable, assuring himself as to the question of sanity by causing the accused to be examined by a medical officer or board.[1]

II. RETURN OF THE PROCEEDINGS FOR CORRECTION.

Nature of the Authority. Incident to the discretion, vested by the code in the Reviewing Officer, (whether military commander or President,) to approve or otherwise act upon the proceedings and sentence, is the authority, long recognized at military law,[2] (and now affirmed in the Army Regulations,[3]) to cause any error or errors appearing in the record, and capable of correction, to be corrected by the court before final action taken by him on the case. Where, in reviewing the record as transmitted to him, he believes that he has discovered a material omission or other defect, either in the findings or sentence or some interlocutory proceeding of the court, which may properly call for a *disapproval*, he may, instead of formally disapproving, return the record to the court for the purpose of having the requisite amendment made, with a view, if it be duly made, to a final *approval*. To this alternative indeed a reviewing officer will in general naturally and properly resort, provided the court has not yet been dissolved—as of course, (except in an emergency,) it should not be before a case tried by it has been finally acted upon. He may also be called upon to take this course by a superior commander or the President, who, upon the proceedings being transmitted to him for final action, has discovered some material error therein. It is evidently only by the return of the record to the court that the correction can legally be procured to be made, since the reviewing officer cannot make it himself independently of the court,[1] nor can the court, after it has once duly completed and forwarded to him the record, recall it for modification[2]

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[1] See, as illustrating the text, cases in the following Orders:—G. O. 54, Dept. of the Pacific, 1864; Do. 13, Northern Dept., 1864; Do. 49, Dept. of the Susquehanna, 1864; Do. 81, Middle Dept., 1865; Do. 5, Dept. of Ark., 1866; Do. 22, Dept. of Cal., 1866; Do. 40, Dept. of Va., 1866; Do. 62, 73, First Mil. Dist., 1867; Do. 1, Div. of the Pacific, 1872; G. C. M. O. 39, Dept. of the Mo., 1868.

[2] Kennedy, 214; McNaghten, 146; O'Brien, 277; De Hart, 203; 18 Opins. At. Gen., 119; Swaim *v.* U. S., 28 Ct. Cl., 173. It is equally recognized in the Navy. 4 Opins. At. Gen., 19; 6 Id., 204; *Ex parte* Reed, 100 U. S., 22; Smith *v.* Whitney, 116 U. S., 168. And see recent cases in G. C. M. O. 35, 38, Navy Dept., 1892; Do. 9, 93, 102, 103, Id., 1893. Compare the analogous authority of the criminal judge to call upon a jury to correct a defective verdict. Wharton, C. P. § 751; 1 Bishop C. P. § 1004; Regina *v.* Meany, 9 Cox, 233.

[3] Par. 1043.

Occasions and Grounds for its Exercise. These, as stated in the Army Regulations, (par. 1043,) are—"When the record of a court-martial exhibits error in preparation, or seemingly erroneous conclusions on the part of the court." More fully and specifically, these grounds and occasions, (similarly to those which may warrant a disapproval of the proceedings,) may be said to consist of the following:—1. *Clerical omissions or mistakes* in material formal particulars in the making up of the record; such as—an omission to prefix or append a copy of the order convening the court or of an order modifying the detail, &c., or to specify the numbers present at any session, or to state the fact of the administration of the oath or of the according of the right of challenge, or to include a portion of the charges or specifications, or to enter the pleas made thereto or any special plea, or to show that the witnesses were sworn, or fully to record the evidence, finding, or sentence, or to attach an exhibit; or a mis-statement of the name of the accused in the sentence or a specification, thus making a material variance. And with these is to be classed an omission by the presiding officer or judge advocate to certify the sentence or authenticate the record: 2. *Errors of law or fact, or of judgment or discretion*, on the part of the court, in its rulings or conclusions. Such are, mainly, errors in the substance of the findings or sentence—as that the findings, or some of them, are not warranted by the evidence, or are based upon the improper admission or rejection of evidence;[1] or that the sentence is not warranted by or consistent with the findings, or is not itself legally authorized for the offence or offences found; or that the sentence is inadequate, or unduly severe, or inappropriate or inexpedient under the circumstances of the particular case.

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[1] The action taken by the court is usually designated in practice by the term "Revision."

[2] The situation is of course to be distinguished from that of a court which has not yet transmitted its proceedings to the reviewing officer for his action, and which, until it does so, may reconsider and reform its findings and sentence at discretion.

Whether the defect be occasioned by inadvertence, or arise from a misconception of law or military usage, or from an imperfect logic or a misuse of the judicial faculty, it is of course most desirable that it be removed, if practicable, from the proceedings, and the due and rational course of justice be relieved from obstruction and embarrassment. This is particularly to be desired where there has been a *conviction*, since, in the absence of the correction, the sentence may not legally be capable of execution or for other reason may properly have to be disapproved. But in a case of *acquittal* also it is no more than just that an error in form or substance should be caused to be corrected, in order that the record may go on file so perfected that the accused will be fully sustained by it in the event of a subsequent plea of *autrefois acquit.*

Errors which Cannot be Corrected. Radical fatal defects, such as an illegality in the constitution or composition of the court, or a want of jurisdiction of the offence or offender, are of course irremediable by this procedure. So, defects or errors cannot here be corrected which from their nature can be remedied or prevented only at the stage of the proceedings at which they occur, or at least at some time pending the trial—as errors in the charges or specifications, or misrulings of the court upon objections to testimony. Further, the object of the revision being to make the proceedings conform to the *fact*, the power in question does not extend to the correction of errors of form, capable of being corrected if the facts warrant, *when the facts do not warrant the correction.* Thus if the members or judge advocate were not *in fact* sworn, the court, on being reassembled, could not supply an omission of the usual statement in regard to the administering of the oath, by a statement to the effect that the members, &c., *were* duly sworn; nor could it cure the defect by thereupon causing itself, or the judge advocate, to be sworn *nunc pro tunc.* So, if only four members were present on a certain day of the trial, the court could not, on reassembling, declare that a quorum was really then present, nor could it make good or replace the proceedings of that day by repeating them formally and with an actual quorum.

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[1] A modification by the court of a finding may require a modification in the sentence. Griffiths, 90. The court, on the revision, may so far change the finding as to substitute a conviction for an acquittal, adding thereupon a sentence. Griffiths, 92; G. O. 6, Dept. of Va. & No. Ca., 1864; Do. 13, Dept. of Va., 1866.

Correction by Means of New Testimony not Allowable. Nor can the record be returned on account of an error which can be corrected only by means of the introduction of testimony on the merits. The object of the proceeding is not to reopen an investigation which has been closed, or rehear a case once tried and brought to judgment, but simply to revise what has been judicially completed. To permit the introduction of such additional testimony upon the merits would amount substantially to a new trial.[1] Moreover such testimony would have to be received subject to the usual objections and to cross-examination, and to the further introduction of other testimony to meet it, on the part of the defence; and the investigation would thus not only be reinitiated but indefinitely prolonged. And although the evidence admitted were simply that of previous witnesses recalled to elucidate their former statements, there would still practically be a rehearing, and the proceedings would be liable to be protracted in the same manner as where the witnesses were new, only in a less degree. *Interest reipublicae ut sit finis litium*, and most of all that part of the republic embraced in the military state, where prompt and final action is of the very essence of government and discipline. That no evidence whatever shall be presented or heard at this stage is indeed a principle established by the great weight of authority,[1] and this principle, upon a recent reconsideration of the subject, has been emphatically reaffirmed in General Orders,[2] and incorporated in the Army Regulations.[3]

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[1] 6 Opins. At. Gen., 204–5; G. C. M. O. 67, Div. Atlantic, 1888; Do. 89, Dept. of the Platte, 1892.

Course of Proceeding. The record is returned to the court, through the president, or through the judge advocate, (from whom, pursuant to par. 1041, Army Regulations, it should have been received,) with an order or official communication requiring it to reassemble in the case and reconsider the proceedings, or the findings or sentence, with the view of making a certain indicated correction, (or corrections,) therein. Where the alleged error is merely clerical or formal, it is commonly sufficient merely to specify it. In an instance of a supposed error of law or opinion, in the verdict or award of punishment, a brief statement of the reasons deemed to call for the amendment is usually added, or indicated as contained in an accompanying indorsement or report.

Upon the receipt of the order, the judge advocate, (or president,) notifies the several members, who proceed to reassemble at the original place of meeting, or at a new one if the order, as it may, shall name such. The same rule prevails at such meeting as at all the sessions of a general court-martial, that five members are both necessary and sufficient for the transaction of business.[4] If meanwhile, by absence or any casualty of the service, the members who sat on the trial have been reduced below five, the order cannot take effect. But if five at least can assemble, it is immaterial that their number be considerably less than the original number of the court in the case, *provided*—for this is essential—such five all took part in the trial and judgment.[1] If the court has been *increased* in the number of its members, it cannot, as increased, (*i. e.* composed in part of the new and additional members,) be convened to revise proceedings taken by it before such increase.[2]

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[1] McNaghten, 146; Simmons § 724; note 3; Clode, M. L., 167; Macomb, 69; O'Brien, 280; De Hart, 204; G. C. M. O. 16, Dept. of the Platte, 1875. And see 6 Opins. At. Gen., 201. The present British law is to the same effect. Army Act § 54, (2;) Rules of Procedure, § 51, (A.)

[2] G. O. 47 of 1879; publishing an opinion of Judge Advocate General Dunn. And see DIGEST, 679; also G. C. M. O. 130, Dept. of Dakota, 1885. In a case in G. C. M. O. 36, Dept. of the Mo., 1886, the proceedings were returned to the court for the insertion of evidence of previous convictions. But this is not evidence on the merits. And see Do. 36, Id., 1887, where the record was returned "because of an irregularity in receiving" such evidence.

[3] Par. 1043.

[4] DIGEST, 678; 7 Opins. At. Gen., 338; G. C. M. O. 54, Dept. of Texas, 1873; Do. 35, Dept. of the Platte, 1891. In the case of a regimental or garrison court, it would be necessary of course that all the three members should reassemble.

A proper quorum being convened, the judge advocate should withdraw, the proceeding being analogous to that which takes place upon a deliberation when the court is cleared.[3] The accused is not present. Of course, if evidence were taken, the accused would properly attend, (with his counsel, if any,) and the session would be open to the public; but, as already stated, the occasion is not one at which testimony can be introduced. If indeed the correction be one which cannot accurately or fairly be made without the concurrence of the accused, as where it concerns the form of some peculiar special plea, motion, objection, &c., interposed by him, it will be regular and proper to admit him (with the judge advocate,) to the revision. Such cases, however, are most rarely presented, since the reading, on each day of the trial, of the previous day's proceedings will in general enable the accused to have every particular relating to his defence fully and precisely set forth.

Upon the assembling of the requisite members, the order, and accompanying papers if any, are read, and the court, after such deliberation and voting as may be necessary, proceeds, if concurring with the Reviewing Officer, to rectify the error by making the proper minute on the subject.[4] If it determine that no error has been committed, it will return the record with an official communication, declining, for reasons stated[1] to make the correction.[2] In such event the Reviewing Officer cannot of course actually compel the court to take the action proposed,[3] but he may return to it the record for a *reconsideration* of its conclusion, at the same time responding to or commenting upon the reasons of the court as he may deem expedient. The court may then decide to adopt his view and make, finally, the correction, or it may again return the proceedings with an official statement to the effect that it adheres to its former determination, adding such argument or observations as it may see fit. There is in our military practice no limit to the number of times that the record may thus be returned,[4] but it is not often that the same is in fact returned a second time after the court once decide not to make the amendment. Upon such conclusion the Reviewing Officer, (unless convinced that the court is in the right in the matter,) will commonly dispose of the case with an expression of disapproval of its action on the revision, as also, in general, of the sentence, finding, or other proceeding in respect to which the desired correction has been declined to be made. If, however, the error does not affect the validity of the sentence, he may, while disapproving the conclusion of the court, approve the sentence rather than that the offender go unpunished.[1]

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[1] DIGEST, 678; G. O. 45, Dept. of the East, 1865. In a case in G. O. 28, Northern Dept., 1865, the proceedings were disapproved because one officer of the original detail who did not sit on the trial took part in the revision.

[2] G. O. 64 of 1827. (Ruling of President J. Q. Adams.)

[3] See Clode, M. L., 167.

[4] The request to make the correction is one which, in a proper case, "a court with a soldierly sense of its duties never refuses." G. C. M. O. 7, Dept. of the Platte, 1893.

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[1] The court is not obliged to give reasons for adhering to the proceedings as they stand, but it will in general be no more than properly deferential for it to do so.

[2] Instances of the court declining to amend may be noted in the following Orders:—G. O. 48, Dept. of Va. & No. Ca., 1864; Do. 21, Dept. of the Ohio, 1866; Do. 48, Dept. of Dakota, 1868, Do. 5, Dept. of the Lakes, 1869; G. C. M. O. 159, Dept. of the Mo., 1871; Do. 55, Dept. of Cal., 1875.

In G. C. M. O. 20, Dept. of the Colorado, 1894, the Reviewing Officer notices an "unbecoming pride of opinion," on the part of the court, in refusing to make a proper correction.

[3] DIGEST, 678. Pipon & Col., 63.

[4] G. O. 2 of 1844; O'Brien, 279. DIGEST, 678. So a criminal judge may "send back" a jury "any number of times to reconsider their finding." Regina *v.* Meany, 9 Cox, 233. In the British military law the proceedings may be returned to the court for correction but once. Army Act § 54, (2.)

It may be noted that where the court has made or attempted to make the correction, the proceedings may again be returned for the correction of errors in the form or substance of the revision itself, or for the purpose of having it completed or elucidated. See the marked instance in Gen. Swaim's Case, as fully set forth in G. C. M. O. 19 of 1885.

Form of recording the revision. The proceedings of the court upon the revision are to be recorded with the same formality as those had at any other session.[2] The record of the revision will properly consist of a continuation of, or rather supplement to, the previous record in the form of an addition at the end of the original proceedings.[3] It will regularly comprise the reconvening order and accompanying papers, or copies of the same, a statement of the fact of the reassembling at the time and place specified, with a designation of the quorum of members present, and a brief account of the action taken in considering the matter of the alleged error, making the correction, &c. In setting forth the details of a correction, proper reference will be made to the part of the original record in which the error appears. The record of the revision will be authenticated by the signature of the president: if an amended sentence is adjudged it will be certified in the same manner as the original sentence.[4]

It is particularly to be noted that the action had and correction made by the court, (except where consisting merely in the affixing of an omitted signature,) can legally appear—be stated and made—*only* in and by the supplementary record of the revision; that it cannot, by interlineation, annotation, or otherwise, be inserted in, or attached or added to, the original proceedings. *These* must remain intact as recorded; no word or statement thereof, however erroneous or objectionable *per se*, can be erased, expunged, or modified; nor can a re-written and corrected page or extract be substituted for a defective portion in the body of the record.[5]

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[1] See case in G. C. M. O. 16, Dept. of the Platte, 1875; also G. C. M. O. 19 of 1885.

[2] DIGEST, 646.

[3] See G. C. M. O. 29, Dept. of the Mo., 1874.

[4] Griffiths, 90; Clode, M. L., 167; O'Brien, 280; G. O. 42, Dept. of the Tenn., 1863; DIGEST, 646.

[5] Simmons § 726; Kennedy, 215; Griffiths, 90; Clode, M. L., 167; Macomb, 69; O'Brien, 280; De Hart, 205; DIGEST, 646, 679; Capt. Barron's Trial, p. 47; G. O. 42, Dept. of the Tenn., 1863; Do. 26, Northern Dept., 1865; Do. 54, Dept. of Dakota, 1867; Do. 42, Id., 1868; Do. 3, Dept. of the South, 1870. G. C. M. O. 47, (H. A.,)

The correction must be the act of the court. The proposed amendment can only be made by the court as convened for the purpose, and must be the act of the court *as such.* That the error is a merely clerical one does not authorize its being amended by the judge advocate alone, and *any* correction assumed to be made either by that official, or by the president or other member, apart from the court and without its authority, by means of an erasure, interlineation, addition to the record or otherwise, must be wholly unauthorized and ineffectual in law.[1] Nor can either the president or the judge advocate, at this stage, properly add his signature, (previously omitted,) to the original proceedings without the concurrence of the court. In a word, each and every amendment, whether of form or substance, must be made by the court, or by its direction, and as a part of its formal proceedings had under the order reassembling it.

III. ACTION OF THE PRESIDENT AS CONFIRMING AUTHORITY.

Provisions of the Articles of War. We have seen that, under Art. 104, the President is the *approving* officer in all cases in which he has himself ordered the court. The law on the subject of the *confirmation* of military sentences by the President,

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1886; Do. 36, Dept. of the Mo., 1886; Do. 35, Dept. of the Platte, 1891; Do. 5, 26, Dept. of Cal., 1891. In a recent case in G. C. M. O. 114, Dept. of Cal., 1882, Gen. Schofield disapproves the action of the court, in "the revision of the *plea*, which was incorrectly made by inserting the omitted words in the body of the *original record*, instead of adding them in the record of the revision with the proper reference to the original proceedings." (Citing DIGEST.) "The irregularity, however, is not regarded as affecting the legality of the proceedings."

[1] G. C. M. O. 47, (H. A.,) 1886; Do. 38, Dept. of Texas, 1893; Do. 22, Dept. of the Col., 1894; G. O. 3, Dept. of the South, 1870.

Compare, in connection with the present Title, the following Orders, in which are published proceedings had upon Revision, in a variety of cases:—G. O. 61, 75, 76, 90, Army of the Potomac, 1862; Do. 23, Dept. of Va. & No. Ca., 1863, Do. 6, 48, 53, 60, Id., 1864; Do. 13, Dept. of Va., 1866; Do. 21, Dept. of the Ohio, 1866; Do. 48, Dept. of Dakota, 1868; Do. 5, Dept. of the Lakes, 1869; Do. 57, First Mil. Dist., 1867; Do. 22, Id., 1869; G. C. M. O. 159, Dept. of the Mo., 1871; Do. 55, Dept. of Cal., 1875. Such proceedings are now rarely specifically promulgated. In general, where a revision has been had and a correction made in the findings or sentence, or otherwise, only the proceedings as *finally settled* are published.

which has been compared to "the judgment of a court of last resort,"[1] is contained in Arts. 105, 106 and 108, as follows:—

"ART. 105. *No sentence of a court-martial, inflicting the punishment of death, shall be carried into execution until it shall have been confirmed by the President; except in the cases of persons convicted, in time of war, as spies, mutineers, deserters, or murderers, and in the cases of guerilla-marauders, convicted, in time of war, of robbery, burglary, arson, rape, assault with intent to commit rape, or of violation of the laws and customs of war; and in such excepted cases the sentence of death may be carried into execution upon confirmation by the commanding general in the field, or the commander of the department, as the case may be.*

"ART. 106. *In time of peace no sentence of a court-martial, directing the dismissal of an officer, shall be carried into execution, until it shall have been confirmed by the President.*

"ART. 108. *No sentence of a court-martial, either in time of peace or in time of war, respecting a general officer, shall be carried into execution, until it shall have been confirmed by the President.*"

Art. 105—Action upon Death Sentences. This Article consists of a provision of Art. 65 of the code of 1806, consolidated with and modified by provisions of the Act of July 17, 1862, c. 201, s. 5, the Act of March 3, 1863, c. 75, s. 21, and the Act of July 2, 1864, c. 215, s. 1. The Article of 1806 had required the approval of the President in cases of death sentences, only in time of war. The Act of 1862 made this approval a requisite to the execution of *all* death sentences. The Act of 1863 engrafted an exception upon this general rule by authorizing the execution of such sentences "upon the approval of the commanding general in the field," in cases of "any person convicted as a spy or deserter, or of mutiny or murder." The Act of 1864 extended this authority by empowering "the commanding general in the field, or the commander of the department, as the case may be," to carry into execution all sentences imposed by *military commissions* upon "*guerilla-marauders* for robbery, arson, burglary, rape, assault with intent to commit rape, and for violations of the laws and customs of war." It may be observed that Art. 105, probably by inadvertence, has included this class of war-criminals as subject to trial by *court-martial:* they are properly triable only by military commission,—the tribunal employed for their trial during the late war,—as the Act of 1864 recognizes.

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[1] "Like the judgment of a court of the last resort, final and conclusive." Wooley *v.* U. S., 20 Law Rep., 631, But the *approval by a military commander* of a sentence which does not require the action of the President, (or other superior authority,) is equally final and conclusive. See *ante*—"Approval."

These exceptions related to *time of war*, and are therefore so distinguished in the present Article. The effect of the Article thus is—that, in time of peace, and in time of war except in the particular cases specified, (when the military commanders indicated may finally act upon and enforce the sentence,) a confirmation by the President is essential to authorize the execution of the death penalty.

In Chapter XXV will be considered in what consists the crime of the spy, and the crimes of desertion, mutiny and murder. What is the further offence of "violation of the laws and customs of war," and what is the class termed in the statute "guerilla-marauders," or, as they have commonly been designated, "guerillas," will be set forth in PART II relating to the Law of War.

The established principle that a sentence of death, (or any other sentence,) requiring the confirmation of the President, must receive the approval of the proper military commander—the original Reviewing Officer—before it is forwarded or presented for the action of the President, or confirmed by him, has already been stated. Of course if such sentence is *disapproved* by such commander, nothing remains for the President to act upon, and the proceedings are not forwarded.

The further principle that, in the absence of any legal requirement as to the *form* of the confirmation, the same may be authenticated and declared by the Secretary of War, as the representative of the President, will be more particularly noticed under the next head.

Art. 106—Action upon Sentences of Dismissal. This Article is but a transcript of a provision to the same effect contained in Art. 65 of the code of 1806. In providing that, in time of *peace*, sentences of dismissal, in order to have effect, shall be confirmed by the President,[1] it impliedly authorizes their being executed upon the approval of the proper military commander alone, in time of *war*—an authority further conferred by Art. 109.

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[1] In a single case—that of Surgeon Sumby—the President has exercised the power of confirming a sentence of dismissal of an officer of

Form of confirmation—Authentication by the Secretary of War. The only material questions which have been raised under this Article are—whether, and if so in what form, the action of the President, in confirming a sentence of dismissal of an officer, may legally be authenticated by the Secretary of War. These questions have within a recent period given rise to much judicial consideration. It had been held by Judge Advocate General HOLT in Major Haddock's case, in 1867, and later in that of Major Runkle,[1] (see *post*,) that a confirmation of a sentence of dismissal made and subscribed by the Secretary of War was presumptively the act of the President and sufficient in law. In the latter case this view was sustained by the Court of Claims.[2]

In this case, in which the court-martial was convened by the President, the action taken on the sentence consisted of an endorsement signed by the Secretary in which it was stated that the findings and sentence were "approved," and it was added that, for reasons specified, "the President is pleased to remit all of the sentence except so much thereof as directs cashiering, which will be duly executed." On appeal of the case to the U. S. Supreme Court, it was there held,[3] (in 1886,) that the action required of the President, in passing upon a sentence of dismissal under Art. 106, was judicial not administrative, and therefore not one of those cases in which, in the exercise of executive power, he "may act through the head of the appropriate executive department;" that his personal action and decision were here required; but that it did not affirmatively appear, in that instance, that the proceedings had been ever laid before or submitted to him. "Under these circumstances," the court observe, "we cannot say it positively and distinctively appears that the

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the *District of Columbia Militia*, after the same had been duly approved by the Brig. General Commanding. G. O. 17, Hdqrs., D. C. M., July 14, 1890. These militia were not at this time "called forth," but the power was apparently exercised in view of the Act of March 1, 1889, c. 328, which, in sec. 6, provides "that the President of the United States shall be the commander-in-chief of the militia of the District of Columbia."

[1] Published in G. C. M. O. 7 of 1873.

[2] 19 Ct. Cl., 396.

[3] 122 U. S., 543.

proceedings have ever in fact been approved or confirmed in whole or in part by the President as the Articles of War required." The court does not decide "what the precise form of an order of the President approving the proceedings and sentence of a court-martial should be, nor that his own signature must be affixed thereto. But"—the court concludes—"we are clearly of opinion that it will not be sufficient unless it is authenticated in a way to show, otherwise than argumentatively, that it is the result of the judgment of the President himself, and that it is not a mere departmental order which might or might not have attracted his personal attention. The fact that the order was his own should not be left to inference only."

The court refers, in its opinion, to the exercise by the President of the pardoning power, at the end of the action upon the proceedings, but treats this as a quite distinct and independent act, not affecting the matter of the approval of the sentence. But the important point, familiar to military law, does not appear to have been considered—that there can be no remission without an approval, and that the fact of the remitting by the President of a specific part of the sentence necessarily implies that the sentence must have been first submitted to the President and duly approved by him.

The decision in Runkle's case took the army and the War Department by surprise. In the opinion of the author it was unsound law, and indeed it has been since so qualified by decisions made in similar cases by the same court as to convey the impression that the court has little confidence in it as settling the law. Thus in Lieut. Page's case—one very similar to that of Runkle—the Court of Claims,[1] following, as it supposed, the ruling of the Supreme Court, in the latter case, had decided in favor of the claimant on the ground that the approval of the sentence signed by the Secretary of War was insufficient and inoperative. But, on appeal to the Supreme Court, this decision also was reversed, and it was held[2] that, inasmuch as it was stated, in the form of action and approval, that, in conformity with the Articles of war the proceedings had been "forwarded to the Secretary of War and by him submitted to the President," the approval was to be presumed to be the act of the President, whose actual sign manual, it was now held, need not be affixed. The court say—the "only possible conclusion" from this statement "is that the approval was by the President."

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[1] 25 Ct. Cl., 254.

[2] 137 U. S., 673. And see 17 Opins. At. Gen., 19, 43.

Later, in Captain Fletcher's case, the statement, signed by the Secretary of War, in the form of action and approval, was that, in conformity with the Articles of war, "the proceedings of the general court-martial in the foregoing case have been forwarded to the Secretary of War for the action of the President. The proceedings, findings and sentence are approved, and the sentence will be duly executed." It was held by the Court of Claims[1] that, as the statement did not show affirmatively that the proceedings had been actually submitted to the President, the ruling in Runkle's case, and not that in Page's case, was to be allowed as controlling. On appeal to the Supreme Court, this decision was reversed.[2] The court remark that—"it would be unreasonable to construe the Secretary's endorsement as meaning that he had received the proceedings for the action of the President, in conformity with Article 65," (now Art. 106,) "and had approved them himself and ordered execution of the sentence in contravention of the Article. * * * While it is not said that the proceedings were submitted to the President, it is stated that they had been forwarded to the Secretary of War for the action of the President, and as that is followed by an approval and the direction of the execution of the sentence, which approval and direction could only emanate from the President, the conclusion follows that the action taken was the action of the President." And with regard to the case of Runkle, the court adds—"Reference to the report of that case shows that the circumstances were so exceptional as to render it *hardly a safe precedent in any other!*"

The ruling in Runkle's case has thus practically ceased to be authority.[1] But while it can now scarcely be questioned that an approval by the Secretary of War of a sentence of dismissal of an officer of the army, where the proceedings had presumptively taken the usual direction, would be held valid and effective, the result of the ruling in that case has been that the President now personally subscribes all such forms of confirmation, as well as all other approvals required of him by the Articles of war, with his sign manual, and they appear so signed in the General Orders promulgating the proceedings and action in the case.[1]

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[1] 26 Ct. Cl., 541.

[2] 148 U. S., 84. Affirmed in Ide *v.* U. S., 150 U. S., 517.

Art. 108—Sentences respecting General Officers. This Article, repeated from a provision of Art. 65 of 1806, does not call for extended remark. It may merely be observed that a sentence "*respecting a general officer*" is a sentence imposing any punishment whatever, whether light or severe, upon an officer of that rank.

IV. ACTION OF COMMANDING GENERAL AS CONFIRMING AUTHORITY.

The statutes authorizing and defining this action are Articles 105 and 107.

Art. 105. The cases in which, under this Article, sentences of death may be confirmed and executed by "*the commanding general in the field, or the commander of the department,*" have already been indicated under the Title of the Action of the President as Confirming authority.

Art. 107. This Article prescribes as follows:—"*No sentence of a court-martial appointed by the commander of a division or of a separate brigade of troops, directing the dismissal of an officer, shall be carried into execution until it shall have been confirmed by the general commanding the army in the field to which the division or brigade belongs.*"

This Article is a provision of the Act of December 24, 1861, of which the main portion is contained in Article 73, considered in Chapter VI, where are defined the terms "division" and "separate brigade." Like Art. 73, the present Article is operative only in time of *war.*

It need only be observed that, as in cases of sentences required to be confirmed by the President, the sentences indicated in this Article, preparatory to being confirmed by the army commander, must be duly *approved* by the officer who convened the court or his successor in the command.

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[1] As further illustrating this ruling, see 15 Opins. At. Gen., 290; 17 Id., 43, 397; Ide *v.* U. S., 25 Ct. Cl., 401; Armstrong *v.* U. S., 26 Ct. Cl., 387; Senate Report, 868, 45th Cong., 3d Sess., March 3, 1879.

V. EXECUTION OF SENTENCES.

The Law on the Subject. The general law authorizing the execution of sentences, (and which may be regarded as including sentences imposed by regimental and garrison as well as general courts,) is contained in Art. 109, as follows:—"*All sentences of a court-martial may be confirmed and carried into execution by the officer ordering the court, or by the officer commanding for the time being, where confirmation by the President, or by the commanding general in the field, or commander of the department, is not required by these Articles.*"

Effect of the Article. The effect of this Article is, that the sentence may be executed or caused to be executed by the officer who ordered the court and has approved the sentence, (or his successor in command,) in all cases except those in which the President, (by Art. 105, 106, 108, or Sec. 1326, Rev. Sts.,) or a superior commander, (by Art. 105 or 107,) is required finally to confirm the sentence; and that, in the excepted cases, the order for the execution shall proceed from the President or such superior. In all but the excepted cases, the approval of the original reviewing officer remains a complete and sufficient warrant and order for the execution; and his action thereon is final and conclusive,[1] and to forward the record for the action of the President, &c., must be not only superfluous but unauthorized.[2]

Discretion of "the Officer ordering the Court," &c. The discretion of this officer is absolute under the Article in all cases not belonging to the excepted classes. Whether he shall confirm and execute the sentence rests entirely with him, and is for him alone to determine. Here no superior can direct or instruct him. Where the case involves a question of law or fact upon which, in a similar instance, an opinion has been expressed by an official superior, he will, as remarked in referring to the exercise of the power of approval under Art. 104, properly take such opinion into due consideration; but he is not required to concur therein, nor should he do so if the same does not accord with his own views of law and justice. To the exclusive authority here conferred upon him is attached an obligation to exercise such authority in conformity with law, and for the best interests of the service as he understands them.

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[1] "The action" (under Art. 109,) "is not final until the officer ordering the court shall confirm it. This confirmation is the judgment of the law." 19 Opins. At. Gen., 107.

[2] Where the sentence "may be lawfully carried into execution on the confirmation of the officer ordering the court, neither the President nor Secretary has lawful authority to approve or disapprove" the same. 11 Opins. At. Gen., 251. And see G. O. 341 of 1863.

The terms used in the Article. The technical or descriptive terms employed in Art. 109, such as "confirmed," "the officer ordering the court," "the officer commanding for the time being," have been construed in considering the subject of Approval and the provisions of Art. 104.

Execution of Specific Punishments. The execution of the different specific punishments imposable by sentence—as death, dismissal, imprisonment, forfeiture, reduction, discharge, &c.—has already been fully considered in Chapter XX.

General principle governing Execution—Punishments not to be added to. When a legal military sentence has been duly passed upon and approved by the competent authority, "it becomes," in the language of the U. S. Supreme Court,[1] "final and must be executed;" that is to say unless the power of pardon or mitigation, conferred by Art. 112, (or by the Constitution upon the President,) be interposed. That the adjudged punishment may not be *added to*, by or through the action or order of the reviewing officer, is a fundamental principle of the law of the execution of sentences.[2] Thus a sentence of simple dismissal, suspension, or discharge may not be made to work a forfeiture of pay, nor may a sentence of simple imprisonment be made to involve compulsory hard labor or solitary confinement. This principle has also been illustrated in treating of the different punishments in Chapter XX. The most marked instance in our military history of a violation of this principle was the action of Major General Jackson, when commanding in Florida in 1818, in the case of Robert C. Ambrister, tried by a general court-martial for inciting and aiding the Creeks in prosecuting war against the United States. The court first sentenced the accused to be shot; then, having reconsidered, as it could legally and regularly do, its judgment, substituted therefor the milder punishment—which thereupon became the legal and only sentence—"to receive fifty stripes on the bare back and be confined with a ball and chain to hard labor for twelve calendar months." In acting upon the case as reviewing officer, Gen. Jackson disapproved of the reconsideration, approved—as he could not legally do, since it did not legally exist—the first sentence, and ordered that the accused "be shot to death agreeably to the sentence of the court;" and he was shot accordingly.[1] This order not only contained a false statement of fact, but—not being an act of war or resorted to in the exercise of martial law, but official action taken upon the proceedings of a court-martial under the Articles of war—was wholly arbitrary and illegal.[2] For such an order and its execution a military commander would *now* be indictable for murder.

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[1] Dynes *v.* Hoover, 20 Howard, 81.

[2] Harcourt, 133, 146; Maltby, 101; Simmons § 762; 11 Opins. At. Gen., 139. "A commanding officer charged with the duty of reviewing the proceedings of the court, cannot increase the severity of a sentence. He may approve or disapprove or mitigate, but he cannot impose a new sentence of a more severe character." Swaim *v.* U. S., 28 Ct. Cl., 174.

Conclusive effect of an Executed Sentence. It is a further general principle that a sentence once duly approved or confirmed, and carried into execution, is beyond the reach, *i. e.* no longer subject to the action, of the Reviewing Officer, in the exercise of his authority under the Articles of war. In the first place, a sentence thus duly executed is wholly beyond the control of the *revisory function*—is no longer subject to review by the commander who has approved or the President who has confirmed it. Of course a thing *done*—as an imprisonment undergone, for example—cannot, physically, be *undone.*[3] But where, though the punishment itself cannot be undone, its effect may be—as in a case of a sentence of dismissal of an officer or of the forfeiture of the pay of a soldier—here also the sentence cannot be recalled or reopened, nor can the executed penalty be reversed, rescinded, or modified.[1] Further, such a sentence is beyond the reach of the *pardoning power:* neither can the commander, under the authority conferred by Art. 112, "pardon or mitigate" an executed punishment, nor can the President remit it by a pardon of the offender under the Constitution.[2] Thus, as to a sentence of court-martial when duly and fully executed, the Reviewing Officer is *functus officio*, his authority is exhausted; some new act quite outside of the powers of revision and pardon must be resorted to for the rehabilitation or relief of the party. An officer, for example, duly dismissed the service by sentence of court-martial cannot be restored to the army by an attempted revoking of the confirmation or setting aside of the sentence, or by a pardon or remission, but can be so restored only by a new appointment made by the President and confirmed by the Senate. And an officer or soldier who has been condemned by an executed sentence to forfeit or pay to the United States a sum of money, can be relieved from or reimbursed for such payment, only by an act of legislation in his behalf on the part of Congress.

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[1] The record of this trial, with that of A. Arbuthnot tried by the same court, is contained in full in American State Papers, Military Affairs, vol. I, pp. 721–734. And see Printed Trials of Arbuthnot and Ambrister, London, 1819.

[2] The Report of the House Committee on Military Affairs condemned Jackson for this very conduct, and other conduct in the case, and also reflected upon the court. Am. S. P., Mil. Af., vol. 1, p. 735. (Jan. 12, 1819.)

[3] See Hoffman *v.* Coster, 2 Whart., 468.

VI. SUSPENSION OF EXECUTION OF SENTENCES.

Art. 111. The provision of law on this subject is contained in this Article, as follows:—"*Any officer who has authority to carry into execution the sentence of death, or of dismissal of an officer, may suspend the same until the pleasure of the President shall be known; and, in such case, he shall immediately transmit to the President a copy of the order of suspension, together with a copy of the proceedings of the court.*"

Effect and Object of the Article. This Article, derived from a provision to a similar effect of Art. 89 of 1806, extends to officers, when authorized, (under Art. 105, 106, or 107,) to execute sentences of death or dismissal, the privilege of suspending the execution of the same till they shall have been submitted to and finally acted upon by the President; in other words the privilege of devolving upon the President the responsibility of the action to be taken upon such sentences.

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[1] 4 Opins. At. Gen., 170, 274; 6 Id., 369, 514; 10 Id., 64; 15 Id., 291, 433; 17 Id., 32, 297; 18 Id., 21.

[2] *Ex parte* Garland, 4 Wallace, 381; 12 Opins. At. Gen., 548. As to the remission of *continuing* punishments, see *post.*

The principal object, however, of the Article, which is operative only *in time of war*, would appear to be, not to relieve commanding officers of their due responsibility in proper cases,[1] but to afford an opportunity for the remission or mitigation of a sentence of death or dismissal when, in the opinion of the commander, it should properly be remitted or mitigated.[2] The power of pardon or mitigation in cases of such sentences cannot, even in time of war, legally be exercised by a military reviewing officer, but, by Art. 112, is expressly reserved to the President.[3] By the suspending, therefore, of the execution of the sentence as indicated in the Article, an opportunity is afforded for the exercise of executive clemency, if the President think proper to extend it.

Approval a prerequisite to Suspension. As has already been remarked, the exercise of the function specified in this Article must have been preceded by a formal *approval* of the sentence by the officer; in other words, the execution of a sentence which has not been duly approved, or which has been disapproved, by the convening authority, (or his successor in command,) cannot legally be *suspended*, nor can the sentence be acted upon by the President under the Article.[4]

Transmission of the Order and Proceedings. The "order of suspension" is merely the official statement, appended to the record after the sentence, and signed by the reviewing authority, to the effect that the sentence is approved but its execution suspended, and that the proceedings are transmitted to the President for his action under the 111th Article of war. The transmittal of *copies* only is called for by the Article: in practice, however, the original proceedings, with the original action of the reviewing officer, are always forwarded.

"The Pleasure of the President." This term is a broad one, and the Article has been construed in practice as not limiting the President to a remission or mitigation of the punishment or punishments, but as empowering him to approve or disapprove the suspended sentence, (or to approve in part and disapprove as to other part,) in the same manner and with the same effect as if it had been a sentence to the execution of which his confirmation was made requisite by Art. 105 or 106.

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[1] See G. O. 139, A. & I. G. O., Richmond, 1863.

[2] Note context of Art. 89 of 1806.

[3] See G. O. 97, 101, 147, of 1863; 6 Opins. At. Gen., 124–5.

[4] G. O. 209 of 1863.

VII. PARDON AND MITIGATION OF PUNISHMENT.

Exercise of Pardoning Power by the President, in Military Cases. The President, where he is Reviewing Officer, *viz.* when acting upon the sentence of a court convened by himself, or a sentence requiring his confirmation or action, while he may of course exert the plenary power vested in him by the Constitution, in practice almost invariably exercises a partial pardoning power of *remission* of the punishment analogous to that conferred upon reviewing officers by Art. 112, (see *post.*) In *other* military cases,—as in cases of applications or appeals addressed to him for clemency by officers or soldiers, whose sentences have been sometime finally acted upon by the competent authority and who are undergoing the same,—here, where he acts not as reviewing officer but as constitutional pardoning power, he exercises a full or limited measure of such power according to circumstances. In some early cases formal pardons were issued by the President to enlisted men under sentence,[1] but at present, in cases of prisoners confined at Leavenworth or Alcatraz Island, the mere remission in Orders[2] of the unexecuted portion of the punishment of imprisonment is the form, commonly, of the act of grace. In cases of *officers* under sentence, formal pardons, in terms similar to the pardons issued to civilian offenders, have more frequently been granted,[3] but even these have not been common.

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[1] The early Order books in the A. G. O. contain formal pardons issued by President Monroe to soldiers, under sentence of death for desertion or mutiny, dated March 17, 1817, and March 5, Oct. 13, and Dec. 22, 1818.

[2] The President, in remitting punishments, may act through the Secretary of War, in Orders emanating from the War Department, as he may in approving or confirming sentences. See *ante*—"Art. 106."

[3] A formal pardon was issued to Fitz John Porter, formerly Maj. Gen., on May 4, 1882; but this in terms only *remitted* the *punishment*, *i. e.* the continuing punishment of disqualification for office adjudged by sentence of court-martial in January, 1863.

As extended to classes of persons—Amnesty. The constitutional pardoning power, being plenary, is not restricted in its exercise to the pardoning, or remitting of the punishment, of a single individual at a time. The authority of the President, under the pardoning power, to extend amnesty to a *class* of similar offenders has been affirmed by the authorities,[1] and he has repeatedly, by proclamation or general order, offered pardon to *deserters* who may return to duty within a time specified.[2] This instance indeed illustrates another attribute of the power under consideration, *viz.* that it may be exercised prior to the conviction or trial of the offender.[3]

Other attributes of the pardoning power will be considered in connection with the next Subject.

Exercise of the power of pardon and mitigation by Commanders—Art. 112. This provision, derived from Art. 89 of the code of 1806, and which completes the grant of powers to the officers authorized to act upon the sentences of courts-martial, is expressed as follows:—"*Every officer who is authorized to order a general court-martial shall have power to pardon or mitigate any punishment adjudged by it, except the punishment of death or of dismissal of an officer.*"

Nature of the Authority Conferred—Remission. This Article confers upon the commanders specified two distinct powers—a power to "pardon" and a power to "mitigate." As to the former, this, though of a quality similar to that of the pardoning function vested in the President by the Constitution, is different from and inferior to the same in effect and scope. *That* is a *plenary* power to pardon the *offence* and the *offender*, by the exercise of which the stigma of the conviction is done away with, the penalties and disabilities incident thereto or to the sentence are removed, and the offender is personally completely rehabilitated in law.[1] But the power given by the Article is a power only to "pardon" a "punishment," that is to say a power of *remission*;"[2] and if the word *remit*—the term properly describing the pardoning of a punishment—were substituted for the word *pardon* in the Article, its phraseology would be less antiquated[3] and more precise. The exercise of this limited power simply relieves the accused in whole or in part from the *punishment*; the guilt of the offender as found, and the penal liabilities consequent thereupon, remaining unaffected in law. Thus a mere remission of the punishment adjudged a deserter will not relieve him from the civil disqualification attached by statute to his conviction;[4] nor, in a case contemplated by Art. 100, will such a remission relieve an officer from the consequence, incident upon his conviction and sentence, of not being associated with by other officers: in either case a pardon of the offender by the President will be necessary to restore the forfeited right. So—it has been held by the Attorney General[5]—a remission of a continuing sentence of suspension will not restore to the officer the relative rank which he has meanwhile lost, while a full pardon may have that effect.

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[1] Jones *v.* U. S., 137 U. S., 202; Jenkins *v.* Collard, 145 U. S., 547; U. S. *v.* Klein, 13 Wallace, 141, 147; Armstrong *v.* U. S., Id., 154; Pargoud *v.* U. S., Id., 156; Cooley, Prins. Const. Law, 100; Do., Const. Lim., 139. And see the very interesting opinion on this subject of Solicitor General Taft in 20 Opins., 330.

[2] See instances cited in Ch. XVI—"Plea of Pardon," p. 405 and note.

[3] In military cases, the instances in which the pardoning power has been exercised before trial have generally been of the class known as *constructive* pardons. See *post*—"Constructive Pardon;" also "Plea of Pardon" in Ch. XVI, p. 406.

The "power to pardon" accorded to commanders is thus seen to be quite distinct from the pardoning power of the President, which, devolved upon him alone by the Constitution, could not indeed be delegated by Congress to any other official or person. This power in fact, and also that to "mitigate," given by Art. 112, are not modes or measures of the constitutional function, but powers attached as incidents to the power to order courts and approve and execute their sentences, being simply forms of discretion vested in the reviewing officer to reduce or dispense with, when deemed by him just or expedient, the punishment or a punishment awarded by the court.

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[1] "The pardon makes him, as it were, a new man, and gives him a new capacity and credit." 2 Hawkins, c. 37, s. 48. And see *Ex parte* Garland, 4 Wallace, 380; U. S. *v.* Klein, 13 Id., 128; Osborn *v.* U. S., 91 U. S., 474; Knote *v.* U. S., 95 U. S., 149.

[2] As to the distinction between remission and pardon, compare Perkins *v.* Stevens, 24 Pick., 277; Lee *v.* Murphy, 22 Grat., 799; 1 Bishop, C. L. § 763; 2 Opins. At. Gen., 329; 5 Id., 588; 8 Id., 283-4.

[3] The term has been derived without change from the early codes of 1775 and 1776.

[4] As those imposed upon deserters by Secs. 1996, 1998, Rev. Sts. So forfeitures by operation of law remain unaffected—as those attaching by the operation of Sec. 1265, Rev. Sts., and pars. 128 and 1514 Army Regs. And see 18 Opins. At. Gen., 427.

[5] 17 Opins., 31; 20 Id., 243.

Attributes of the Power of Pardon or Remission— ***1. It is co-extensive with the punishment.***[1] Assimilated in a measure to pardon proper, remission has, within its scope, some corresponding attributes. Thus its exercise is not restricted to the time and occasion of the formal approval of the sentence by the reviewing authority, but may be resorted to at any stage of the execution of the punishment, and so long as any portion of the same remains unexecuted.[2] What remains, for example, of a term of imprisonment of a soldier may be remitted, at any time before its expiration, by the commander who originally ordered the court and approved the sentence, or by his successor meanwhile in the command, provided of course the soldier is still confined within the command. So, a *continuing* punishment—as one of disqualification to hold office, or of a loss of files—may be remitted at any time prior to the completion of its term.[3] The President has frequently pardoned military punishments pending the period of their enforcement, and in repeated instances at or near the end of the late war remitted the unexpired portions of the sentences of a large class of offenders, in and by one and the same General Order.[4] The same course was also pursued by department and army commanders.[5] At present military reviewing officers are authorized to remit the unexpired terms of soldiers confined within their commands, though such soldiers have been dishonorably discharged under their sentences;[1] except that in cases of convicts confined at the Military Prison at Leavenworth, or, (after discharge,) in penitentiaries,[2] the remissions have been ordered by the President through the Secretary of War.

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[1] "Coextensive with the offence and the punishment." Rawle on the Const., 178.

[2] The counter view, as expressed in 1888 by Atty. Gen. Garland, (19 Opins., 106,) was not accepted by the Secretary of War but dissented from, as indicated by the Army Regulations of 1889, par. 1044, and by the uniform practice.

[3] 12 Opins. At. Gen., 547; 17 Id., 303, 656.

[4] As by G. C. M. O. 98 of 1865; Do. 46 of 1866; G. O. 19, Mid. Mil. Dept., 1866.

[5] In G. O. 8, Mil. Div. of the Tenn., 1865, Maj. Gen. Thomas remitted the unexpired terms of 245 military prisoners confined in the military prison at Nashville. And see Do. 26, Id.; Do. 2, 3, 7, Id., 1866—in each of which a similar authority was exercised in a large number of cases.

2. *It may be full or partial.* That is to say, where a sentence includes several punishments, the President, or a commander thereto authorized by Art. 112, may remit all, or one or more; and a remission of one will not affect the authority to execute, or interrupt the execution of, another or the others.[3] So a part of a punishment may be remitted at one time and another part at a subsequent time.[4] A full and unqualified remission—it may be added—of a particular punishment will operate to remit an additional punishment the execution of which is made dependent upon the execution of the other. Thus a remission of a term, or the unexecuted portion of the term, of an imprisonment, will remit a penalty of dishonorable discharge directed by the sentence to take effect at the end of the full term.

4. *It may be unqualified or conditional.* That a pardon or remission may be conditional, and that the condition may be *precedent* or *subsequent*, is settled law.[5] During the period especially of the late war, pardons on express conditions, granted, in Orders, both by the President and by army commanders, were not unfrequent in military cases. Thus sentences were remitted on the conditions precedent—that the accused re-enlisted, or enlisted "during the war;"[6] that he paid back certain bounty money received by him;[7] that he paid a fine, or part of a fine imposed by his sentence;[8] or gave satisfactory security for its payment;[1] that he turned over the company fund in his hands;[2] that he made good an amount found to have been embezzled by him;[3] that he reimbursed the expenses incurred in his apprehension as a deserter;[4] or the value of public property, (as a horse, carbine, &c.,) appropriated in deserting,[5] or that he made good the time lost by his absence;[6] that he allotted certain pay sentenced to be forfeited, or other pay, to the support of his family.[7] Similarly sentences of military commissions have been remitted on the condition precedent that the accused took an oath of allegiance and obedience to the laws, or gave bond for his future good behaviour, or both.[8]

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[1] Circ. No. 3, (H. A.,) 1893.

[2] Circ. No. 5, (H. A.,) 1888.

[3] Perkins *v.* Stevens, 24 Pick., 280. And compare the provision of the Act of Feb. 20, 1863, relating to punishments for civil offences, now incorporated in Sec. 5330, Rev. Sts.

[4] 3 Opins. At. Gen., 418.

[5] 2 Hawk., c. 37, s. 45: 4 Black. Com., 401; 1 Bishop, C. L. § 760; U. S. *v.* Wilson, 7 Peters, 150; *Ex parte* Wells, 18 How., 307; Com. *v.* Haggarty, 4 Brewst., 326; 1 Opins. At. Gen., 77, 341, 482; 5 Id., 368; 6 Id., 405; 11 Id., 229; 14 Id., 124.

[6] G. O. 3, 6, 104, Dept. of Va. & No. Ca., 1864. Compare 1 Kent, Com., 308.

[7] G. O. 184, Dept. of Va. & No. Ca., 1864.

[8] G. C. M. O. 428, 640, of 1865.

So, though more rarely, military pardons have been granted on express conditions *subsequent.* As where an officer was pardoned on condition of his resigning his commission;[9] where the sentences of soldiers in confinement were remitted on condition that they faithfully served their full terms of enlistment;[10] where, in certain cases tried by military commission, the sentences were remitted on the condition that the party should forthwith quit a certain place or part of the country and remain absent during the war,[11] or that he should engage in no illicit trade, nor aid or have intercourse with the enemy, during the war.[12]

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[1] G. C. M. O. 117 of 1864.

[2] G. C. M. O. 14 of 1868.

[3] G. C. M. O. 228 of 1865. And see DIGEST, 554.

[4] G. O. 29, Dept. of the Platte, 1869.

[5] G. O. 32, Dept. of the Platte, 1869.

[6] G. O. cited in last note.

[7] G. C. M. O. 214 of 1864; Do. 503, 668, of 1865.

[8] G. C. M. O. 103, 119, 151, 156, 203, 229, 251, 256, 270, 528, of 1865.

[9] See 1 Opins. At. Gen., 343.

[10] G. O. 46 of 1866. And see G. C. M. O. 94 of 1867; G. O. 104, Dept. of Va. & No. Ca., 1864; G. O. 108, Dept. of the East, 1872. Compare the terms of the offers of amnesty to deserters in G. O. 43 of 1866; Do. 102 of 1873.

[11] G. O. 34, Dept. of Washington, 1865. So, it is held in the civil courts that a condition attached to a pardon of a convict sentenced to imprisonment, that he leave the State or the country, and do not return during his term or at all, is a valid condition; and that if, after accepting the condition, he does return, he may be remanded to prison to serve the sentence. Flavell's Case, 8 W. & S., 199; Com. *v.* Haggarty, 4 Brewst., 326; People *v.* Potter, 1 Edmonds, 235; *Ex parte* Lockhart, 1 Disney, 105.

[12] G. C. M. O. 99 of 1865. In Do. 131, Id., the party, sentenced

Where the pardon is conditional, the condition must be *accepted* by the beneficiary:[1] in military cases, the acceptance is generally indicated, not formally, but by his voluntarily submitting to the proceeding or performing the act required as a condition.[2] As remarked by the court in a case in Pennsylvania[3]—"It lies upon the grantee to perform the condition. If he does not, in case of a condition precedent, the pardon does not take effect; in case of a condition subsequent, the pardon becomes null; and if the condition is not performed the original sentence remains in full vigor and may be carried into effect."

The condition, whether precedent or subsequent, must be legal, reasonable, and not repugnant to the grant.[4]

But, at present, in time of peace, *conditional remissions*, under Art. 112 are of most rare occurrence.[5]

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to be imprisoned "to the end of the rebellion," was "enlarged to remain at liberty so long as he does not misbehave."

[1] "The offender may accept or not at his option." 6 Opins. At. Gen., 405. For "the condition may be more objectionable than the punishment." U. S. *v.* Wilson, 7 Peters, 161. And see 5 Opins. At. Gen., 537; Lee *v.* Murphy, 22 Grat., 798.

Some form of acceptance indeed is necessary to give effect to *any* pardon. As the court say in U. S. *v.* Wilson, *ante*—"A pardon is a deed to the validity of which delivery is essential, and delivery is not complete without acceptance." And see In the matter of De Puy, 3 Benedict, 307.

[2] In civil cases the condition is often formally accepted in writing upon the pardon by the beneficiary. In *Ex parte* Wells, 18 Howard, 307, the form of acceptance was as follows:—"I hereby accept the above and within pardon, with condition annexed." And see the similar form of acceptance in Lee *v.* Murphy, 22 Grat., 790.

[3] Flavell's Case, 8 W. & S., 199. Or, as the law is stated by Bishop, (1 C. L. § 914)—"If the condition of the pardon is precedent, that is if, by its terms, some event is to transpire before it takes effect, its operation is deferred until the event occurs. If the condition is subsequent, the pardon goes into operation immediately, yet becomes void whenever the condition is broken." In *Ex parte* Wells, the law is stated to be that where the condition is not performed, "the party may be brought to the bar and remanded to suffer the punishment to which he was originally sentenced." If the conditional pardon has been granted *before trial*, and the condition not performed, the party may be brought to trial for his offence. See DIGEST, 554.

[4] People *v.* Pease, 3 Johns. Cas., 335. Flavell's Case, *ante;* People *v.* Potter, 1 Edmonds, 235; Com. *v.* Haggarty, 4 Brewst., 326.

[5] See an instance of a conditional *mitigation* recognized as legal, under "Mitigation," *post.*

By whom the Powers may be Exercised under the 112th Article. The Article describes in general terms the persons by whom the powers specified may be exercised, by the words—"Every officer who is authorized to order a general court-martial." A better designation—one more in harmony with the other provisions relating to the action of the reviewing authority—would be: "Any officer authorized to execute the sentence of a court-martial." As expressed, the Article includes —(1) the officers authorized by Arts. 72, 73, 81 and 82, and Sec. 1326, Rev. Sts., to order certain courts, and who have ordered such courts, which have adjudged sentences; (2) the successors in command of such officers, or "commanding for the time being"—a class already defined in construing Arts. 104 and 109.

An officer thus authorized must of course exercise *personally* the powers conferred: he cannot *delegate* the same—to an inferior commander or staff officer—any more than he may delegate the power to order the court or approve its proceedings.

Execution of Remission. Remission is pointedly distinguished from pardon proper by the form and manner of its execution. Thus while a constitutional pardon is a deed which takes effect upon delivery and acceptance,[1] remission is executed by *order* simply. The remission is an order made in his discretion by the commander, and, like any other military order, executes itself, that is to say is executed upon its promulgation to the party affected. Whether or not he may have applied for the remission, no acceptance by him is necessary or material.

Commutation. Commutation is conditional pardon. It is pardon granted on the condition subsequent that the party receive and undergo a less severe punishment of a different nature[2]

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[1] U. S. *v.* Wilson, 7 Peters, 150.

[2] The leading adjudged case on the quality of commutation is *Ex parte* Wells, 18 Howard, 307, with which see Opinion of the Justices, 14 Mass., 472; Perkins *v.* Stevens, 24 Pick., 278; Lee *v.* Murphy, 22 Grat., 789; Cooley, Prins. Const. Law, 100;—also 5 Opins. At. Gen., 369, in which is practically overruled an earlier opinion of Mr. Wirt, in 1 Opins., 328, in which commutation is confused with mitigation. It may be added that the phraseology of some of the existing statute law has also tended to confuse the student. Thus, while the Act of July 13, 1866, provided that in time of peace no officer should be dismissed except in pursuance of the sentence of a general court-martial, or "in *commutation* thereof," using here the proper term, this term,

—a condition which, like all conditions annexed to pardons, must be accepted or the grant will not take effect. In military cases, the acceptance is in general given, not formally, but impliedly by the party's entering upon without objection, and duly undergoing, the substituted punishment.[1] Commutation is distinguished from *mitigation*, which, as will hereafter be noticed, is a reduction of a punishment in degree or quantity only; the power to mitigate not authorizing the changing of the species of the penalty adjudged. But there are certain punishments not susceptible of being reduced in degree; consequently where one of these is imposed by the court, and the same is deemed too severe a penalty to be inflicted upon the accused, who yet, it is considered, deserves some measure of punishment, the mere power of mitigation is inadequate for the occasion, and *commutation*, or the substitution of a lesser penalty of a different nature, must be resorted to. Death and dismissal, for example, are punishments not admitting of lesser degrees or capable of being mitigated; they must therefore, when deemed too rigorous, be exchanged or *commuted* for distinct penalties of minor severity.

Thus death may be commuted to dismissal or dishonorable discharge, or to imprisonment, or to both,—indeed to any recognized military penalty or combination of penalties, since any such penalty or combination is in law less grievous than the *summum supplicium* of death. So, dismissal may be commuted to suspension,[2] loss of files, or other punishment appropriate to

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though retained in one part of the Revised Statutes,—Sec. 1229—has been carelessly changed to "*mitigation*" in the 99th Art. of war and in Art. 36 of the naval code.

It may be noted in this connection that the naval code—in Arts. 54 and 33—expressly prohibits the commutation of sentences.

The provision of the modern British code corresponding to our Art. 112—Army Act § 57, (1)—expressly empowers the reviewing authority to "*remit, mitigate or commute*" punishments adjudged by sentence of court-martial,—a form of conveying the power much to be preferred to that retained in our statute.

[1] See *ante* as to acceptance of conditional pardons in general.

[2] Suspension has indeed sometimes been regarded as an inferior degree of the punishment of dismissal, and as a penalty to which the latter might therefore be *mitigated*. (See 4 Opins. At. Gen., 434; 5 Id., 43.) But such view is a mistaken one, dismissal being an absolute and final separation of the person from the military office and from the army—a status admitting of no degrees. Dismissal is therefore *commuted*, not mitigated, when suspension is substituted for it by the pardoning power.

an officer and less severe than an absolute and disgraceful separation from the army.[1] And, in a case of an enlisted man, a sentence of dishonorable discharge or reduction to the ranks may be commuted to a moderate forfeiture of pay.

It is to be noted, however, that commutation, though more appropriate to cases of punishments which do not admit of mitigation, is not restricted to these in its application. It thus may be resorted to in cases where mitigation is permissible and in lieu thereof. Thus a considerable term of imprisonment, instead of being mitigated to a less term, may be commuted to dishonorable discharge or to a forfeiture of a small amount of pay.[2]

Like other conditional pardon, commutation is, in practice, employed at the time of the approval or confirmation of the sentence or punishment: unlike remission, it is rarely if ever resorted to at a later stage.

Not authorized under Art. 112. The "power to pardon" given by this Article being a power of remission only, and remission consisting simply in the doing away with a punishment, the exercise of the authority to commute would appear to be excluded from the contemplation of the statute. We have seen that commutation is distinct from mitigation. The conclusion would thus be that a military commander could not legally commute a punishment by the authority of this Article.[3] In this connection there may be some significance in the fact that the Article expressly excepts from the application of the power conferred the punishments of death and dismissal, these being punishments which can be abated by commutation only. In practice, however, commutation has not unfrequently been resorted to by military reviewing officers, and there has as yet been no authoritative ruling that such action is not legitimate.

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[1] Dismissal has in a few cases been *commuted* to reprimand. See instance in G. C. M. O. 18 of 1868. In cases of *Cadets*, dismissal and suspension have been commuted by the President to confinement in a light prison for one to three months. G. C. M. O. 70 of 1887.

In G. C. M. O. 31 of 1889, is a peculiar instance of a commutation by the President of a sentence of dismissal of an officer to—"confinement within such limits as the Secretary of War may prescribe and to deprivation of the right to wear the uniform and insignia of his rank in the army for a period of five years."

[2] In substituting one distinct punishment for another by commutation, special care is to be taken that the rule forbidding any *adding to* the punishment by the reviewing officer is not transgressed.

[3] See ruling in DIGEST, 131 § 7.

Constructive Pardon. A party may sometimes be relieved of punishment by an executive act attaching to him a status inconsistent with the infliction or continuance of such punishment.[1] An act of this character operates as an implied, or, as it is usually designated, *constructive* pardon.[2] Thus the appointment to a new office of an officer in arrest under charges will operate to pardon constructively the offence with which he is accused.[3] So, the promotion of an officer under sentence of suspension from rank, or the replacing in his proper command, by authority competent to remit the sentence, of an officer under sentence of suspension from command, will constructively pardon and terminate the suspension.[4] So, the ordering on active duty of a soldier under a sentence of confinement will have the same effect as a formal remission of the punishment;[5] and it will remit also any other punishment the execution of which is made dependent upon that of the confinement—as a dishonorable discharge directed by the sentence to be executed at the end of the confinement. Similarly, a *constructive* remission of a sentence of confinement of a soldier is effected where, pending the execution of a confinement adjudged to be suffered during the remainder of his term of enlistment, a discharge from the service is given him by competent authority.[6]

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[1] 6 Opins. At. Gen., 715. But the mere ordering of an officer under sentence of suspension to attend a court-martial as a witness, does not operate as such pardon. Id., 714.

[2] In Sir Walter Raleigh's Case, (Cro. Jac., 495; Prendergast, 245,) it was held that had his offence been less than treason,—had it been only felony,—his being released from imprisonment while awaiting the execution of his sentence, and placed in command of an army and sent on a foreign expedition, would have operated as an implied pardon.

[3] 8 Opins. At. Gen., 237.

[4] 4 Opins. At. Gen., 8; 6 Id., 123, 715; McNaghten, 22; DIGEST, 732. But allowing an officer under sentence of suspension from rank to turn over property, &c., with a view to settling his accounts as acting quartermaster, has been held not to have any such effect. DIGEST, 554.

[5] See De Hart, 249; Benét, 168; G. O. 98, Dept. of the East, 1868.

[6] This ruling of the Judge Advocate General was approved by the Secretary of War, and communicated to department commanders, from the A. G. O., under date of Aug. 12, 1871. See the same, (published

The subject of constructive pardon, as granted prior to trial, has already been considered under the title of the Plea of Pardon, in Chapter XVII.

Mitigation. This, which, as already observed, is distinct from and not included in the pardoning power,[1] differs from commutation in that it consists, not in changing the nature or quality of the punishment or in substituting a different punishment for it, but simply in reducing it in quantity.[2] Thus an imprisonment or suspension adjudged for a certain term is mitigated by reducing it to one for a less term;[3] a fine or forfeiture of a certain amount, by reducing it to one of a less amount;[4] a loss of a certain number of files, by reducing it to one of a less number.[5] But dishonorable discharge, or forfeiture of pay, cannot, by mitigation, be substituted for confinement, or *vice versa.* The pun-

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as a decision of the Secretary,) in G. O. 72, Dept. of Dakota, 1871; G. C. M. O. 118, Dept. of the Mo., 1871; Circ., No. 15, Dept. of Texas, 1871.

[1] That the President may exercise the power of mitigation only in the capacity of reviewing officer, see note *ante*, citing 2 Opins. At. Gen., 289; DIGEST, 606–7.

[2] "The right of *mitigating* only extends, in my opinion, to lessening the degree of punishment in the same species prescribed, and does not imply any authority to change the nature or quality of it altogether." Washington to Gates, Feb. 14, 1778. Sparks' Writings of Washington. vol. 5, p. 236. And see DIGEST, 131; Circ. 2 (H. A.) of 1885; also 1 Opins. At. Gen., 328, 331; 4 Id., 433, 446. These Opins., however, so far as they relate to *commutation*, were corrected by 5 Opins., 369. See note *ante.*]

[3] In the late war, imprisonments for life or for very long periods were not unfrequently mitigated to imprisonment "during the rebellion."

[4] A general forfeiture of pay, imposed in connection with confinement, has sometimes been mitigated by directing that a small sum, as $10 or $20, or "so much of that amount as may be found due the soldier on the settlement of his account," be retained and paid him on his discharge from confinement. See, for example, G. C. M. O. 1, 4, 8, 10, 13, Dept. of the South, 1881. The object of this form of mitigation is to provide against the party's being discharged in a destitute condition; *practically*, it is uncertain and scarcely to be recommended in general.

[5] Or a public reprimand to a private. G. O. 31, Dept. of the East, 1868. So, a sentence of imprisonment for three years in a penitentiary has been held to be "mitigable to an imprisonment for two years in a military prison." DIGEST, 131. So, one year in a penitentiary to one year in the Military Prison. G. C. M. O. 37, Dept. of the East, 1893.

ishment as mitigated must be *ejusdem generis* with the original; that is to say must be a part of the very punishment imposed by the court.[1]

Pardon and mitigation, though separate functions, may concur in action. Thus where a sentence imposes imprisonment and forfeiture, the reviewing authority may at the same time remit the imprisonment and mitigate the forfeiture, or *vice versa.*

A mitigation must of course be preceded by an approval or confirmation, in whole or in part, of the sentence, since, if the sentence is wholly *disapproved*, there remains nothing to be mitigated. The punishment at least which is mitigated must have been approved, although other punishments contained in the same sentence may have been disapproved. But mitigation, unlike remission, (and *like* commutation,) is rarely if ever employed at a stage subsequent to the approval or confirmation, but, in practice, is contemporaneous with and a part of the same action.

As already noticed, the power conferred by Art. 112 is to mitigate, &c., a *punishment*, not the *sentence.* So, where a sentence contains several punishments, action taken thereon which detracts from the severity of the sentence in the aggregate but does not specifically reduce any punishment as such, is not a legal exercise of the power of mitigation. Thus where a court-martial sentenced a soldier to be dishonorably discharged and then imprisoned for a certain term, and the reviewing officer directed that the discharge be *postponed* till after the imprisonment, it was held by the Judge Advocate General that this action was not legal mitigation and was unauthorized.[2] A case illustrating the same point and also the principle that an adjudged punishment cannot be *added to*, was that of a naval officer in which it was held by the Atty. General that the President could not legally mitigate a sentence of five years' suspension from rank to one of six months' suspension with forfeiture of pay for the same period, although by such action the sentence would as a whole be rendered less severe.[3]

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[1] See 1 Opins. At. Gen., 327; 4 Id., 434, 447.

[2] See this opinion published as approved by the Secretary of War in G. O. 71 of 1875, and incorporated in par. 1031, Army Regs.

[3] 4 Opins. At. Gen., 444. And see 5 Id., 46. Action which diminished the severity of the sentence as a whole, by mitigating one punishment and increasing another, would, as to the *latter* proceeding, be illegal and inoperative.

So, it has been held, in a case of an enlisted man, that a punishment of a term of confinement without hard labor could not legally be mitigated to a shorter term *with* hard labor. Nor, in such a case, could a mitigation legally have the effect of causing a punishment to exceed the established *maximum*. So, a punishment *in itself* illegal cannot of course be mitigated. Thus a confinement in a penitentiary, not authorized by Art. 97, is not susceptible of mitigation to confinement in a military prison.

A *conditional* mitigation has been recognized as legal in a case where a soldier, sentenced to a term of confinement, was allowed, by way of mitigation, a credit of his "guard-house time," (*i. e.* time spent awaiting sentence,) on the condition subsequent of continuous good conduct to the end of his term.

Grounds of Pardon or Mitigation. The subject may well be illustrated by noting here some of the principal grounds upon which the discretion to "pardon or mitigate" has been, in practice, exercised under the Article. Among these, which are as varied as the circumstances of the different cases tried, are the following:—That the accused had been formally recommended to clemency by members of the court; that his previous general character or conduct had been exemplary; that his record in war or Indian hostilities had been good; that he had received a wound in battle or a certificate of merit; that the war services of his father or family had been distinguished; that he had behaved with gallantry before the enemy since the commission of his offence; that he had been required to take part or had voluntarily taken part in an engagement while under arrest; that he had been held an unreasonable time in arrest or confinement before trial, or while awaiting action on his sentence; that he had already been subjected to a disciplinary punishment by his commander; that he had been punished by the civil authorities for the civil offence involved in his act; that he had never had read to him, or been informed of, the Articles of war; that he had been but a short time in the United States, or had but an imperfect knowledge of the English language; that he was a recruit or unusally young and inexperienced; that he had been required to perform an unreasonable proportion of an onerous duty; that he had been improperly put on duty when under the influence of liquor; that, as a deserter, he had voluntarily returned or surrendered himself; that his offence had been induced in part by the harsh treatment or unjustifiable conduct of a superior, or had been attended by special circumstances of provocation or extenuation to which the court had not given sufficient weight, or—the punishment being mandatory—could not legally allow to affect the sentence; that his health was such that he could not safely undergo the confinement adjudged ; that his conduct had been good in confinement ; that he had become morally reformed; that a remission of his sentence had been asked for by civil officials or other citizens of high standing; that he had testified fully and honestly as a material witness for the government on another trial. In cases of *officers*, the more usual grounds have been that their military record, especially in war, has been distinguished, or their public services valuable; that they have borne a high personal character; that their offences were not apparently actuated by a fraudulent or criminal intent, or wilful and deliberate design; that they had made good to the United States or to individuals the losses occasioned by their misconduct; that they were wholly unable to satisfy a fine imposed by the sentence; that the payment of a forfeiture adjudged would impoverish their families, &c.

These and similar circumstances, while, (unless connected with the merits of the case,) not such as legitimately to affect the judgment of the *court*, may, especially when two or more exist in combination, properly be taken into consideration by the Reviewing Officer in determining how much of the sentence it may be just or expedient to execute.[1]

VIII. FORMULATING OF ACTION, AND PROMULGATION.

Statement of Approval, &c. It is directed in the Army Regulations, par. 1041, that the reviewing authority "shall state at the end of the proceedings in each case his decision and orders thereon;" but no *form* for the statement of the action of such authority is prescribed in the military code.[1] Usage, however, has indicated a form for the purpose which is in general substantially followed. This form, (given in the Appendix,) consists of an official statement, (with a proper heading, designating the headquarters, &c., place and date,) to the effect that the proceedings, findings and sentence in the case of (naming the accused) are approved or disapproved, in whole or in part; or that the proceedings and findings are approved in whole or in part, and the sentence, punishment or punishments, is or are remitted, commuted, or mitigated, as the case may be; with a direction as to the disposition of the prisoner in case of conviction, designation of place of confinement if imprisonment be adjudged, &c. Where the sentence is one required to be executed at once in connection with the approval, as is usual in a case of a reprimand, the formal administering of the reprimand is added. The statement, (which, where no more cases are to be tried, generally concludes with an order dissolving the court,) is subscribed by the reviewing officer in his official capacity.

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[1] See Chapter XXI—" Principles governing the imposing of discretionary sentences." In a case in G. C. M. O. 103, Hdqrs. of Army, 1885, in which the court had added to its sentence the following—" The court is thus lenient in view of faithful service before and after desertion and the good character of the accused," it was remarked as follows by Gen Sheridan: " The Lieutenant General is of opinion that the better practice is for a court-martial to award punishment appropriate to the offence established, leaving it to the reviewing authority, in the exercise of his vested powers, to take into consideration previous good character."

Where the sentence is one requiring the action of the President, (or other superior,) the statement, after the formal approval, adds—"and the proceedings are hereby forwarded for the action of the President," &c., or in terms to such effect.

"Order of Suspension." Where the action authorized by Art. 111 is resorted to, the statement, after the approval, proceeds to add what is referred to in the Article as the "order of suspension," which is simply a declaration to the effect that the execution of the sentence is suspended until the pleasure of the President shall be known, and that the proceedings are accordingly transmitted to him for his action, under the Article.

Statement of Confirmation, &c. The action of the President, (or superior commander,) as confirming authority, is simply a formal statement to the effect that the sentence in the case is confirmed and will be executed; or that it is disapproved, remitted, or, in a manner specified, commuted or mitigated, as the case may be; the statement being authenticated by the proper official signature. As above remarked, the action, here, of the President may legally be attested by the Secretary of War: it is the present practice, however, for the President to subscribe the same in person.[1]

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[1] See Vanderheyden *v.* Young, 11 Johns., 150.

Action to be Attached to Record. The action of the original reviewing officer is properly written upon a blank page at the end of the record or upon a sheet attached thereto, below or after the sentence, adjournment, or other final proceeding of the court in the case.[2] The action of the President, &c., if any, is properly written below or after that of the original reviewer, or upon a subsequent attached sheet.

Accompanying Remarks. To the *formal* action or orders thus indicated, the commander or President may, if he thinks proper, add such reflections upon the proceedings or conclusions of the court, the conduct of the prosecution or defence, the make-up of the record, &c., as the facts may warrant. Such comments have the more frequently been resorted to where the finding, sentence, &c., has been in whole or in part *disapproved:* the same, however, have been not unusual where it has upon the whole been deemed expedient that the proceedings or sentence should be approved. In some instances the remarks have taken the form of emphatic stricture or censure. Thus courts have been severely criticised for acquitting where, in the opinion of the reviewing officer, the testimony called for a conviction;[3] for imposing sentences regarded by him as inadequate to the offences found;[4] for findings held by him to be unwarranted by the proof;[1] for errors in admitting or rejecting evidence;[2] for ignorance or neglect inducing grave irregularities in the proceedings or form of the record;[3] for the personal misbehaviour of the members,[4] &c. The conduct not only of the accused[5] but also of the judge advocate, prosecutor, or officer preferring the charges, has also been reflected upon,[6] as well as that of superiors of the accused whose acts, deemed illegal or improper, have been regarded as having induced or aggravated the offences committed,[1] or that of other officers implicated with the accused or otherwise culpable.[2] In rare cases even a subordinate commander who has acted upon the proceedings has been censured.[3] Observations, suggested by the evidence, upon matters affecting discipline or other interest of the service, have sometimes also been promulgated.[4]

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[1] *Ante*—"Action of the President as Confirming Authority: Art. 106."

[2] It is to be noted that the action taken upon the proceedings of *inferior courts* is often less detailed than here described, consisting sometimes in the mere signing, by the regimental, post, &c., commander, of the single word "*Approved*," written at the foot or in the margin of the record. Usually, however—and more properly—a formula, similar to that employed for the proceedings of general courts, but briefer and simpler, is adopted.

[3] See G. O. 81 of 1822, Do. 23 of 1824; Do. 4 of 1843; Do. 2 of 1844; Do. 6 of 1858; Do. 250, 385, of 1863; Do. 74, Army of the Potomac, 1862; G. C. M. O. 112, Dept. of the East, 1870.

[4] See G. O. 64, 68, of 1843; Do. 39 of 1845; G. C. M. O. 88 of 1864; Do. 123 of 1865; G. O. 85, Dept. of the Gulf, 1862; Do. 21, Dept. of the Tenn., 1863; Do. 22, Dept. of the Platte, 1867; G. C. M. O. 50, 80, Dept. of the Mo., 1871; Do. 37 Id., 1875. In G. O. 78, Dept. of So. Ca., 1865, the action of the court is commented upon as inconsistent in its adjudging sentences differing very considerably in severity in cases "entirely similar."

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[1] See G. O. 81 of 1822; G. C. M. O. 88 of 1864; Do. 123 of 1865.

[2] See G. O. 23 of 1824; Do. 4 of 1843; Do. 1 of 1861; Do. 185, Dept. of the Ohio, 1863; Do. 51, Dept. of the East, 1864; G. C. M. O. 11, Army of the Potomac, 1864.

[3] See G. O. 185, Dept. of the Ohio, 1863; Do. 64, 68, Id., 1864; Do. 29, Northern Dept., 1864; Do. 51, Dept. of the East, 1864; Do. 51, Dept. of the South, 1864; Do. 4, Dept. of N. Mexico, 1864; Do. 29, Twenty-fifth Army Corps, 1865; Do. 25, Dept. of So. Ca., 1866; Do. 45, Dept. of the Cumberland, 1867; Do. 33, Dept. of Arizona, 1871; Do. 28, Id., 1876; G. C. M. O. 8, Dept. of Miss., 1865. In G. O. 64, Dept. of the Ohio, 1864, Gen. Schofield, in ordering that the members and judge advocate of a certain court, (whose neglect and carelessness had been exceptional,) "be and they are hereby reprimanded," adds: "The Asst. Adj. Genl. of the Department is hereby cautioned against putting any officer of this court on any important court-martial duty. Of the entire number of cases tried by this court, at least nine-tenths have been disapproved for fatal irregularities."

[4] In G. C. M. O. 123 of 1865, the Secretary of War, in commenting upon the findings as not in conformity with the evidence, and upon the sentence as inadequate, adds: "The reviewing officer also reports that the members of the court were guilty of conduct prejudicial to good order and military discipline in drinking with the accused at various times, and holding private conversations with his counsel, and of other irregularities,"—and he thereupon proceeds to summarily *dismiss* all the members of the court, as well as the accused, from the service.

[5] In a recent G. C. M. O., Dept. of Dakota, (134 of 1884,) Gen. Terry reflects severely upon an accused officer for taking advantage of the privilege allowed to a person on trial, by assailing and insulting his superior officer both in his cross-examination of the latter as a witness and in his statement to the court.

[6] In reviewing a case in G. O. 86, Dept. of the Mo., 1867, Gen. Hancock remarks, generally:—"There being no evidence shown by the record to sustain any one of the charges or specifications, the case has the appearance of a malicious prosecution to gratify personal resentment. To prefer accusations which cannot be maintained is highly injurious to the service and reflects discredit upon those who prefer them; and if upon trial the charges are found to be groundless, the officer preferring them should be held accountable, and be tried himself for preferring malicious charges." And see G. O. 42 of 1851; Do. 239 of 1864; Do. 47, Dept. of the Cumberland, 1867.

In this connection, it may be said that where the subject of the unfavorable criticism is an error capable of being corrected by the return of the proceedings to the court for the purpose, it is but just that this course should first be pursued. Further, the reviewing authority, if he deems it his duty to indulge in reflections such as above instanced, should in general, where practicable, confine himself to comments upon *facts*, and, rather than resort to direct strictures upon individuals, should prefer or cause to be preferred against them formal charges. Such strictures, however, are in some cases quite legitimate, and cannot be avoided: in such cases if the party reflected upon demands a trial by court-martial for the misconduct imputed, his application cannot in general fairly be denied.

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[1] See G. O. 62 of 1863; Do. 22, Dept. of Dakota, 1868; Do. 25, Id., 1873; G. C. M. O. 5, 38, Dept. of Texas, 1873; Do. 43, Id., 1875.

[2] G. O. 39, 41, 46, of 1835. And see Lieut. Jno. Mahon's Case. Simmons § 61.

[3] In G. O. 25, Dept. of So. Ca., 1886, Gen. Sickles, in remarking upon fatal errors appearing in a considerable number of cases, censures the original reviewing officer—a District commander—for repeatedly permitting records containing errors to pass through his hands, without having them returned for correction to the court, and thereupon proceeds to revoke an existing order by which the District command had been designated as a "separate brigade,"—thus divesting the commander of the power to convene general courts.

[4] See cases in James, 500, 501, 694, 831, 832. And see unfavorable comments on the course of official business, in Gen. Talcott's case, G. O. 36 of 1851. In G. O. 43, Dept. of Cal., 1867, Gen. McDowell, in observing that several soldiers belonging to the same command, in pleading guilty to the charge of desertion, "allege, as the reason for committing it, that the comfort of the soldier is neglected, that the food is insufficient, that an undue proportion of the ration is sold for the purpose of forming a company fund, and that reports that the rations were made away with were not attended to,"—orders that the District commander "will immediately investigate the matters contained in these allegations, and will report the result to these Headquarters."

Order of Promulgation. This is the formal written or printed General, (or Special,) Order, in and by which, by the invariable usage of the service, the final reviewing authority publicly announces his action, (and that of a previous reviewing officer, if any,) upon the proceedings of the court in a case tried. It consists simply of a re-statement of such action, (with the accompanying remarks, if any,) as originally written and subscribed in or upon the record as above indicated, preceded by the details proper and sufficient to identify the particular case, *viz.* a designation of the court, and a recital of the charges and specifications,[1] the pleas, (including special pleas,) the findings, and the sentence in case of conviction; the whole being headed by the name of the Headquarters from which issued, the date of issue, (which should preferably be identical with that of the original action,[2]) and the number of the Order in the current series. Where the record has been returned to the court for correction, this fact, together with the procedure upon the revision, is sometimes set forth, but such mention is in general neither necessary nor desirable.

The Order is mainly useful—1st, as a publication to the Army of the result of the trial, and of the opinion of the commanding general, and, (where his action is required,) that of the President, upon the proceedings; 2d, as forming a permanent and convenient memorandum of the more material particulars of the case, for general reference and use in evidence, or for exhibiting *previous convictions;* 3d, as constituting actual or presumptive *legal notice* to the accused of the operative sentence or other conclusion of the court, and of the approval, disapproval, remission or mitigation by the reviewing authority. As already observed, upon the subject of the execution of punishments, the day upon which the order promulgating the approved sentence is published to the command, or served upon and made known to the accused in person,[3] is that on and from which a sentence of dismissal, disqualification, suspension, loss of files, or reduction, in general takes effect, and the rights of the party to pay, rank, &c., are divested or affected. 4th. It is to be added that in cases in which imprisonment is adjudged, the date of the Order of promulgation fixes, as heretofore noticed,[1] the date at and from which the term of the imprisonment begins to be executed in law.

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[1] The specifications are sometimes omitted, but should always preferably be inserted except where they are too numerous or extended, or set forth grossly indecent language or matter otherwise improper to be published.

[2] That the dates should be the same is now directed in par. 1026, A. R.

[3] Not only where the accused is sick, a prisoner, &c., and cannot be present at the publication of the Order to the command, but in *all* cases, a copy of the Order should be furnished to him personally.

The Order, however, though thus important, is not essential to the execution of the sentence or otherwise, and may be wholly dispensed with.[2] This for the reason that the same is not an original proceeding and contains no original matter, its details being merely *copies* of the original particulars contained in the record and of the action taken upon the case. Not being original it is not signed as such; the signature of an assistant adjutant general or other staff officer, sometimes appended to it, being simply for the purpose of *authenticating* it as a true copy.

As a form merely of publication, the Order, if found to contain an error or errors, may be withdrawn or cancelled and a new and correct form substituted, or it may be amended by a supplementary Order specifying and rectifying the mistake.

Special Action in case of Acquittal. In such a case, if there is likely to be any material delay in the issuing of the Order promulgating the proceedings, the commander properly may, and in practice not unfrequently does, direct that the accused be forthwith released from arrest and restored to duty. In the absence of such anticipatory action, an officer or soldier fully exculpated on his trial might be held in undeserved restraint, and subjected to unnecessary suffering or humiliation, for a considerable period, while awaiting the publication of the formal Order.[3]

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[1] Chapter XX—"Imprisonment."

[2] In any event—whether or whenever the proceedings are formally promulgated—the accused should be notified of the result as promptly as is reasonably practicable. Note remarks of Samuel Warren, (Letter to the Queen on a late Court-Martial, p. 254-5,) on the cruelty of keeping an accused long in ignorance of the result of his trial.

[3] In an Act of the Confederate States Congress, of June 14, 1864, relating to the proceedings of military courts, it is provided that, in cases of acquittals, "*the finding of the court shall be announced immediately, and the person so tried and acquitted, if a soldier, shall be released from arrest and returned to duty; and if other than a soldier, discharged from custody, without awaiting the examination or report of the reviewing officer.*"

IX. DISPOSITION OF RECORDS.

Transmittal of Records of General Courts. Par. 985 of the Army Regulations directs that—"the original proceedings of all general courts-martial," &c., "which require the confirmation of the President, but which have not been appointed by him, will be forwarded to the Judge Advocate General," and that "the proceedings of all courts appointed by the President will be sent direct to the Secretary of War." The last duty of the military reviewing officer, after fully acting upon the proceedings of a general court, thus is to forward the record with reasonable promptitude to Washington, as here directed. The transmittal is by mail or express: in cases of unusual public importance the records have sometimes been conveyed by the judge advocate of the court or other officer detailed for the purpose. A copy of the order of promulgation, if any, is properly transmitted with the record.

CHAPTER XXII.

INFERIOR COURTS-MARTIAL, AND MILITARY BOARDS.

INFERIOR COURTS-MARTIAL.

THERE are known to our law three species of Inferior Courts-Martial, which will be considered in this Chapter under the titles respectively of—

I. Regimental and Garrison Courts-Martial.
II. The Field Officer's Court.
III. The Summary Court.

I. REGIMENTAL AND GARRISON COURTS-MARTIAL.

The Law on the Subject. Courts for inferior commands have been authorized by our military codes from the beginning. The substance of the earlier Articles still remains; the variations which the law has undergone will be noticed as we proceed. The *existing* statutory law relating to the courts under this Title, and to the taking of action upon their sentences, is contained in Arts. 81 to 83, Art. 84, Art. 104, Art. 109, and Art. 112—as follows:

"ART. 81. *Every officer commanding a regiment or corps shall, subject to the provision of article eighty, be competent to appoint, for his own regiment or corps, courts-martial, consisting of three officers, to try offences not capital.*

"ART. 82. *Every officer commanding a garrison, fort, or other place, where the troops consist of different corps, shall, subject to the provisions of article eighty, be competent to appoint, for such garrison or other place, courts-martial, consisting of three officers, to try offences not capital.*

"ART. 83. *Regimental and garrison courts-martial, and field officers, detailed to try offenders, shall not have power to try capital cases or commissioned officers, or to inflict a fine exceeding one* *month's pay, or to imprison or put to hard labor any non-commissioned officer or soldier for a longer time than one month.*[1]

"ART. 84. *The oath administered to the members of a general court-martial 'shall also be taken by all members of regimental and garrison courts-martial.'* * * *

"ART. 104. *No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer ordering the court, or by the officer commanding for the time being.*

"ART. 109. *All sentences of a court-martial may be confirmed and carried into execution by the officer ordering the court, or by the officer commanding for the time being.* * * *

"ART. 112. * * * *Every officer commanding a regiment or garrison in which a regimental or garrison court-martial may be held, shall have power to pardon or mitigate any punishment which such court may adjudge.*"

The province and function of a Regimental Court, when acting not as a court but in quite a distinct capacity under the provisions of Art. 30, will be separately considered in Chapter XXV.

The law of Regimental and Garrison Courts-Martial, as now established, will be presented under the following heads: 1. Constitution; 2. Composition; 3. Jurisdiction; 4. Power of Punishment; 5. Procedure; 6. Action upon the Proceedings; 7. Disposition of Records.

Constitution. Arts. 81 and 82 authorize the convening of inferior courts by three sorts of commanding officers:—Commanders of Regiments; Commanders of "Corps;" and Commanders of garrisons, forts, or other places, "where the troops consist of different corps." The courts convened under Art. 81 are commonly distinguished as "Regimental," and those convened under Art. 82 as "Garrison" courts: regimental courts proper, however, are those ordered by the first-named commanders only.

Commanders of regiments. The "officer commanding a regiment," referred to in Art. 81, is the colonel, or other officer in command of the same whatever be his rank. But he must be in the actual command of the regiment *as such*, and competent to issue orders to it as a body. The command must subsist as a regimental organization; if companies are detached so that no officer properly commands it as a regiment, a *regimental* court cannot legally be ordered in or for it under Art. 81.

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[1] The *naval* courts-martial are but two—the "General" and "Summary."

As to the British courts-martial, other than General, *viz.*, the District, Regimental, Field General, and Summary—see Army Act, s. 47, 48, 49, 55.

Commanders of corps. The term "corps" may have different significations in different connections. As employed in Art. 81, it is deemed to signify a separate integral portion of the army, (other than a regiment,[1]) "organized by law with a head and members." It must be complete within and of itself, not a body made up of detachments from different commands temporarily acting together.[2] Further, it must contain not only a force of soldiers enlisted for or incorporated in it, but also officers commissioned in or for it as such who may compose the court contemplated by the Article. The Corps of Engineers, (including the engineer battalion,) as organized under Secs. 1094 and 1151, Rev. Sts., completely answers this description, and the Chief of Engineers is authorized to convene a court as a commander of a "corps" in the sense of the Article. The same has been held in regard to the Chief of Ordnance, in view of his separate command of officers and enlisted men authorized and organized under Secs. 1094, 1159 and 1162, Rev. Sts. So, the Signal Corps, as constituted, under existing law, of both officers and enlisted men under the command of the Chief Signal Officer, is properly such a corps as here contemplated. On the other hand, the Corps of Cadets of the Military Academy is not regarded as a "corps" within the meaning of Art. 81, because it comprises no commissioned officers of the army and thus no material out of which the commandant could compose a court for it as a "corps." The Superintendent of course, as commander of the post of West Point, where the force always consists of "different corps" in the sense of Art. 82, may convene *garrison* courts for the trial as well of cadets as of the enlisted men of the army on duty at the post.

"Corps" courts, as such, even when clearly authorized, are rarely resorted to in our practice; general courts, or—where legally convenable—garrison courts, being commonly employed instead.

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[1] The Article distinguishes it in terms from a regiment. So it may be regarded as distinguished from any component of a regiment or multiple of regiments—as a company or a brigade.

[2] See Scott's Military Dictionary—"Corps."

Commanders of Garrisons, &c, While Art. 81 authorizes courts for commands consisting of a single element, *i. e.* comprising only officers and men of one and the same organization, Art. 82 provides for the assembling of courts in commands of a *composite* character. The one Article is thus the complement of the other.

Construction of Art. 82—" Where the troops consist of different corps." The first point to be noticed in construing this Article is that the term of description—"where the troops consist of different corps," is, according to the weight of authority, to be understood as general, *viz.* as applying not merely to the words "other place," but also to the words "garrison" and "fort."

The original British article relating to inferior courts for mixed commands would seem to have distinguished between commanders of "districts, garrisons, forts, castles, or barracks," *as such*, as one class, and commanders of "towns or places where the force was made up of detachments," as a separate class.[1] The context and punctuation, however, of our own earliest Articles of 1775 and 1776, favor the view that the limitation—"where the troops consist of different corps" was intended to apply alike to all the commands previously specified;[2] and though this punctuation was modified—by the dropping of the comma before "where"—in the Articles of 1786 and 1806, it has been revived in the code of 1874. Moreover, that the limitation was a *general* one was clearly the construction of Major General Scott in the General Order presently to be cited,[3] and was evidently also that of O'Brien:[4] further, it was expressly ruled to the same effect by Judge Advocate General Holt,[5] and this view is now uniformly acted upon in practice. If it be objected that this interpretation would preclude from convening a court-martial the commander of a garrison whose force was wholly made up from a single corps or arm of the service, it may be answered that it can scarcely happen that a properly constituted garrison command will be so entirely simple; one or two representatives at least of some corps other than that composing the body of the command being almost invariably present with it.[1]

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[1] See Samuel, 622.

[2] And the same is to be inferred from the British article of 1765 from which our own was immediately derived. See Appendix.

[3] G. O. 5 of 1843, cited *post.*

[4] Page 288.

[5] See G. O. 13, Fourth Mil. Dist., 1867, cited *post.*

Meaning of "other place." As to the term "other place," this, it is to be observed, is a designation of the most comprehensive character, including any camp, post, barracks, bivouac, rendezvous, hospital, arsenal, transport, or other situation or locality whatever at which there may be stationed, or may temporarily remain, a command of the nature contemplated by the Article.

Meaning of "different corps." In the original article of 1775 the language employed was: "where the troops under his command consist of detachments from different regiments or of independent companies." The term "*different* corps" would thus appear to have reference primarily to detachments from different arms or branches of the military force serving together—as infantry and cavalry, artillery and engineers, &c. By the construction, however, already indicated as announced from Army Headquarters in 1843, a significance was attributed to the description, "where the troops consist of different corps," which considerably enlarged their purport and application. This was, that, to fix upon the command the character of one consisting of "different corps," and to authorize its commander to convene a garrison court, it is sufficient that there should be on duty with the command, as a part of it, a *single* representative only—officer or enlisted man—of some arm or component of the military establishment other than that one of which the command, with this exception, is made up.[2] Thus, if the body of the command consists of a regiment of infantry, it will be sufficient for the purpose indicated if there be stationed or serving with it a single officer or enlisted man of a cavalry or artillery regiment, or of any branch of the staff of the army, as, for example, a medical officer or hospital steward, officer or non-commissioned officer of the quartermaster or subsistence department, chaplain, &c.[1]

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[1] See *post*—"Meaning of 'different corps.'"

[2] This construction, as expressed by General Scott in G. O. 5 of 1843, was as follows:—"In order that the practice throughout the army, under the second sentence of the 66th Article of war, may be uniform, it is published for the information of all, as the opinion at General Headquarters, that the presence on duty of an ordnance sergeant, like that of an officer or man of any other different corps, at any

Rank of the commander, in general. As observed of the commander of the "regiment" or "corps" specified in Art. 81, it is not necessary that the commander of the "garrison, fort, or other place," should be of the degree of a *field officer.* To empower and enable him to assemble the court he need only be a *line* officer, with *four* officers under him eligible to serve as members and judge advocate.

The commander as accuser, &c. Inasmuch as the provision of Art. 72, in regard to the contingency of the convening commander being "accuser or prosecutor," does not apply to inferior courts or cases of enlisted men, the commander of a regiment, garrison, &c., is authorized to convene a court-martial under Art. 81 or 82, although he may be the actual accuser or prosecutor of the party, or a party, to be tried. It is of course desirable that the officer constituting the court should not be the person from whom the charges emanate or who is the prosecuting witness in the case; but the requirements of discipline may sometimes necessitate that the two characters be united where the command is a small one or the exigencies of war enjoin immediate action.

Form of convening order. Until recently no judge advocate was detailed with regimental or garrison courts, but the

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military post, garrisoned with troops, gives to its commanding officer the legal power to appoint garrison courts-martial for the trial of petty military offences committed at the same."

[1] O'Brien, 288; Coppée, 41. In G. O. 13, Fourth Mil. Dist., 1867, Gen. Ord states the law as follows:—"At posts where, in addition to the troops forming the chief part of the garrison, there is on duty an officer or enlisted man of the Ordnance, Medical or any other Corps, as a hospital steward or ordnance sergeant, the Commanding Officer can, if a sufficient number of officers are present, constitute a Garrison Court-Martial and act on the proceedings in accordance with the 66th and 89th" (now 82d, 109th and 112th) "Articles of War."

junior member acted as *recorder*.[1] *Now*, in view of the comprehensive provision of Art. 74 of the present code, a judge advocate may be, and in practice is, appointed in the convening order precisely as in an order convening a *general* court.[2]

In view of the injunction, applicable to both species of courts, of Art. 94, the commander may properly convey in the order a specific authority to "sit without regard to hours:" occasion for adding this, however, is much less frequently presented than in orders convening general courts.

In time of *war*, in view of the provisions of Art. 80, a statement is sometimes appended in an order detailing a regimental or garrison court to the effect that the same is resorted to for the reason that it is impracticable to convene a field officers' court. Such statement, however, is not an essential; and, where not employed, the law would presume from the face of the order that the court was authorized and legal.

Composition—"*Of three officers.*" By the codes of 1775 and 1776 it was directed that regimental, &c., courts should consist of not less than five members where that number could be conveniently assembled, otherwise of three. The present Arts. 81 and 82 provide that such courts shall consist "of three officers." *Officers* is of course identical with *commissioned* officers,[3] and—subject to the provision of Art. 78[4]—means of course officers of the *army*.

Detailing of himself by the commander. Of the three members of the court, the commander is not authorized to detail himself as one. A prohibition substantially to this effect—that the commander should not act as a member—was indeed contained in the earliest Articles:[5] that the same is not repeated in the later codes is doubtless owing to the fact that the principle that the officer who constitutes the court and executes the sentence should not also assume to act as judge upon the trial is too firmly established to require to be reasserted in terms. Thus if, beside the commander, there are not present in the command three other officers available for detail as members, (together with one eligible as judge advocate,) no court can be convened. The commander must wait until he is supplied with the requisite number of officers, or the case be referred for trial to a general court.

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[1] O'Brien, 289; De Hart, 129; Macomb, 86; G. O. 49 of 1871.

[2] G. O. 15 of 1880, incorporated in general terms in par 1007, Army Regs.

[3] Sec. 1342, Rev. Sts. That the members may also have military *rank*, and that professors (and cadets) of the Military Academy are not competent to act as members of the inferior courts, see 1 Opins. At. Gen., 469; 2 Id., 251; 6 Id., 328, 330; also Chapter VII, *ante*, on the Composition of General Courts.

[4] See Chapter VII, *ante*, "Regulars and Marines associated."

[5] It occurs in the Articles of 1775 and 1776, in the Massachusetts Articles of 1775, and in the British Articles of 1765 from which they are derived. See Appendix.

Rank of the detail. As to the rank of the members, it is to be said that the same is not regulated by any statute. It is indeed recommended by some authorities[1] that the detail consist in general of a captain and two subalterns: in the smaller commands however the court must often be composed of three lieutenants.

Jurisdiction—*Prohibitions as to exercise of.* Articles 81–83 expressly preclude regimental and garrison courts-martial from taking cognizance of *capital* offences or offences of *commissioned officers.*[2] They may therefore legally take cognizance of the offences, other than capital, not only of all soldiers, but of all non-commissioned officers belonging to regiments, or to corps in the sense of Art. 81, or forming part of garrisons, &c., as defined in Art. 82. Any Orders or Regulations,[3] which prohibit the trial by inferior courts of any such non-commissioned officers or other enlisted men, except by the "special permission" of department or other commanders, operate as a restraint upon the statutory jurisdiction of these courts, and are so far unauthorized, as encroaching upon the province of legislation.

A capital offence, as has been remarked in a previous Chapter,[4] is not only one expressly required to be visited with the death penalty, but one *punishable* with death at the discretion of the court. An inferior court, therefore, cannot legally assume jurisdiction of any of the offences, however slight they may be, which are specified in Arts. 21 to 23, 39, 41 to 46 and 56, because the same are therein made punishable "by death or such other punishment as a court-martial may direct."[1] But an offence made punishable simply "as a court-martial may direct" is not a capital offence for the reason that, by Art. 96, the punishment of death cannot legally be imposed unless expressly designated as an authorized penalty: such an offence is therefore not within the prohibition.

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[1] Adye, 92; Tytler, 177; Macomb, 85.

[2] In the code of 1775 *officers* were expressly made subject to the jurisdiction of a regimental court, by Arts. XVII, XIX, XXIII and XXIV, and by Additional Article 16. See Appendix.

[3] As G. O. 36, 38, 92, of 1890; Do. 29 of 1891; Do. 67 of 1893, amending pars. 105, 232, 254, 1563, A. R.

[4] Chapter XVIII—"Testimony by Deposition;" Chapter XX—"Death."

There may be distinguished a *third* class of offences which, though not capital, are not triable by inferior courts. These are the civil crimes which, when committed by soldiers in *time of war*, are, by Art. 58, made exclusively punishable by "*general* court-martial."

Jurisdiction of the different inferior courts distinguished. It is further to be noted that a "*regimental*" court may adjudicate only the cases of soldiers of the specific regiment or corps, the 81st Article authorizing the commander to appoint courts for his own regiment or corps alone:[2] a *garrison* court, on the other hand, may try enlisted men belonging to any one of the detachments or contingents of which the command is made up.

Extent of jurisdiction in general—Cognizance of grave offences. Except as thus limited by the Articles, the jurisdiction of the inferior courts is coextensive as to all offences and offenders with that of the superior court-martial. In other words, a regimental or garrison court is *legally authorized* to take cognizance of all military offences of soldiers, *however grave*, provided the same are not made punishable capitally, or exclusively by a general court. But while inferior courts are thus empowered to pass upon many cases of serious offences, their authority to *punish* is so inadequate to the proper disposition of such cases in the event of conviction that they should not be called upon to try them if it can be avoided, but the same should be reserved for the action of general courts.[1] Thus a case of larceny from a fellow soldier or officer should properly be referred to the higher court. And so of aggravated instances of drunkenness on duty, of absence without leave, or of other breach of military discipline.[2] But where a case of more than ordinary gravity has, by competent authority, been duly referred for trial to an inferior court, it cannot decline to proceed with the trial on the mere ground that its power of punishment is not considered adequate to the offence charged. Where indeed the offence as developed by the testimony turns out to have been a considerably more serious one than the commander could probably have anticipated, the court may well suspend proceedings and report the facts to him, with the suggestion whether, in the interests of discipline, the case might not preferably be disposed of by a general court.[3]

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[1] Macomb, 86; De Hart, 62, 63; Benét, 41, 42; DIGEST, 94–5; G. O. 17 of 1852; Do. 21 of 1858; Do. 18 of 1859; Do. 9, Dept. of Utah, 1858. In Capt. Howe's Case, (G. O. 10 of 1857,) the attempting to compel a garrison court to assume jurisdiction of a violation of the 21st (then 9th) Article was treated as a military offence, the officer being specifically charged with and convicted of the same.

[2] See Maltby, 19.

As affected by Arts. 102 and 103. It has been noted in a previous Chapter[4] that the provision of Art. 102, that "no person shall be tried a second time for the same offence," is of general application, and precludes inferior equally with general courts from taking cognizance of cases once duly tried.

On the other hand it has been remarked that the jurisdiction of inferior courts is not restrained by the limitation of Art. 103, this being confined in terms to "general" courts. But designed as the inferior courts especially are for a summary administration of justice, it will be of the rarest occurrence that so long a period as two years will have elapsed before a case suitable for trial by one of these tribunals is brought before it.

Power of Punishment. Art. 83 declares that inferior courts "*shall not have power* * * * *to inflict a fine exceeding one month's pay, or to imprison or put to hard labor any*

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[1] By the original articles of 1775 and 1776, the regimental, &c., courts were in terms declared to be instituted for the trial and punishment of "small offences."

[2] It need hardly be added that *desertion*, though legally cognizable by an inferior court in time of *peace*, (not being then a capital offence,) could only adequately be punished, and therefore properly passed upon, by a general court.

[3] See O'Brien, 289.

[4] Chapter XVI—"Plea of Former Trial."

non-commissioned officer or soldier for a longer time than one month."[1]

"*Fine*," here, measured as it is by the month's pay of the soldier, has practically the same meaning as forfeiture. A fine, in the sense in which the word is employed in the civil procedure, is rarely if ever adjudged by a regimental or garrison court; the pecuniary mulct imposed under this provision of the Article being almost invariably a forfeiture of a month's pay, or of a certain number of dollars of pay of a lesser amount.

The limit of the so-called "fine" or forfeiture, being thus fixed, cannot of course legally be exceeded.[2] Where the sentence, in the event of a conviction, will probably include a forfeiture of a larger amount than a month's pay, as where the accused is charged with the loss or destruction of public properly of a greater value, the case should properly be referred for trial to a general court.[3]

Care should especially be taken, in imposing forfeiture *with reduction*, not to make the forfeiture too great in view of the pay of the rank to which it is to apply. Thus a sentence, adjudged a sergeant, to be reduced and forfeit fifteen dollars monthly pay, was declared illegal for the reason that the pay forfeited, which —it was held—must be private's pay, was in excess of the monthly pay of that grade.[4]

Should the accused be entitled to any monthly *pecuniary* allowance in addition to pay, to sentence him to forfeit his *pay and*

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[1] That "month," where used in the Articles, means *calendar*, (not lunar,) month—see Chapter XX, *ante*.

It may be noted that, by the Act of Oct. 1, 1890, c. 1259, s. 1, the President is "authorized to prescribe specific penalties for such minor offences as are now brought before garrison and regimental courts-martial;" but this authority has not as yet (1894) been exercised.

[2] As to the "*retained pay*" that may be included in a forfeiture imposed by an inferior court, it is declared in Circ., No. 10, (H. A.,) 1893, as follows—"Under the 83d Article of War an inferior court-martial has power to award a sentence forfeiting a specific amount of money equal to the soldier's pay, including retained pay, for one month; but when the sentence recites a forfeiture of pay for one month (or, in a trial by general court-martial, of pay for several months), without a specification of a fixed amount, or without expressly including the retained pay, it will be held that the retained pay is not forfeited."

[3] See De Hart, 60.

[4] Circ. No. 3, (H. A.,) 1886.

allowances for a month would be an exceeding of the power of punishment accorded by the Article, and therefore illegal.

Imprisonment and hard labor. In regard to these further specified punishments, (which, as has already been remarked, are quite distinct,) it need only be repeated that the court should clearly observe the limitation as to quantity prescribed by the Article. Thus where a sentence, "to be confined till the expiration of his term of service," was adjudged by an inferior court in a case in which it did not appear from the evidence or otherwise that the term of the soldier would certainly expire within a month from its approval, it was held by the Judge Advocate General that the sentence should be disapproved unless corrected upon a reassembling of the court.

The imprisonment here authorized is commonly executed by confinement in the guard-house. "Hard labor," as a distinct penalty, is now rarely adjudged by inferior courts, being mostly reserved for cases of persons sentenced by general courts to confinement in a military prison.

The measure of punishment in general. While a soldier may be sentenced by an inferior court *both* to forfeit a month's pay *and* be confined (or put to hard labor) for a month, the measure of punishment imposed *at one trial* cannot legally exceed that prescribed by Art. 83, however many or grave may be the offences charged and of which the accused is convicted. Upon different trials, however, by the same court or different courts, and by different sentences thereby adjudged, a soldier may legally be subjected to forfeitures and confinements of which the total shall considerably exceed the month's limit.[1]

Up to a recent period it had uniformly been held that an exceeding by an inferior court of the scope of the power of punishment to which it was limited by the statute could not be made good by any action of a reviewing commander. But, in Circular No. 12, of October 6, 1892, it is announced as a decision of the Acting Secretary of War, as follows—"When a sentence of confinement or forfeiture is in excess of the legal limit, that part of it which is within the limit is legal, and may be approved and carried into execution." The practice has been modified accordingly.

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[1] See G. O. 18 of 1859.

The provision as to punishments not exclusive. The Article, in specifying that inferior courts shall inflict only a certain quantity of three designated punishments, does not necessarily exclude, and is not in practice construed as excluding, such courts from imposing other punishments suitable for enlisted men. Thus *reduction to the ranks* may be and often is adjudged by these courts to non-commissioned officers, either as the sole penalty or in addition to one or more of the penalties named in the Article. Where indeed imprisonment or hard labor is awarded to a non-commissioned officer, reduction is generally and properly imposed with it, it being deemed prejudicial to discipline that an enlisted man should be subjected to a degrading punishment while still holding the office and wearing the chevrons of a sergeant or corporal. But *dishonorable discharge*, (in view of the provisions of Art. 4,) can be imposed only by a general court.

Solitary confinement, or confinement on bread and water diet,[1] may also, (subject to the limitation of Art. 83, as to time,) legally be, and sometimes, though not often, is adjudged by inferior courts. These courts have in some cases also, for petty offences, imposed such corporal punishments as carrying logs, marching with a loaded knapsack, &c., but this class of punishments, not being recognized in par. 1019 of the Army Regulations, has become in great measure disused, at least for time of peace.[2] A sentence "to be drummed out of the service,"—an ignominious form of discharge,—if imposed by an inferior court, would be illegal,[3] general courts only being authorized, (by Art. 4,) to discharge soldiers by sentence.

Procedure. The procedure of a regimental or garrison court is in most respects substantially identical with that of a general court-martial.[4] The majority of the Articles of war which relate to the conduct of a military trial refer in terms to "courts-martial" without distinction, and are thus applicable to the inferior equally as to the superior courts. Such, for example, are Art. 84, prescribing the oath to be taken by the members; Art. 86, providing for the punishment of contempts; Art. 88, recognizing the right of challenge; Art. 91, relating to the use in evidence of depositions; Art. 93, authorizing the granting by the court of continuances; Art. 94, fixing the hours of session; Art. 95, directing as to the order of voting by the members. As to matters not regulated by statute, the rules of the procedure and practice of general courts, as fixed by the common law of the service, are ordinarily applicable to, and to be followed by, inferior courts. Thus it is the duty of the senior member of the court to preside, preserve order, &c.; the action or judgment of the court is determined by the vote of the majority;[1] the function and authority of the judge advocate are as set forth in the Chapter treating of that official; the rights of the accused are similar to those heretofore indicated as customarily accorded him. So, the record of a regimental or garrison court is made up and authenticated in substantially the same manner and form as that of a general court,[2] and, when completed, is transmitted to the convening anthority.[3] Such distinction indeed as exists between the procedure of the inferior and that of the superior court consists mainly in the fact that the former is in general simpler and more summary than the latter.

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[1] See par. 1021, A. R.

[2] See Chapter XX—"Restrictions by military usage."

[3] G. O. 33, Dept. of the Mo., 1861.

[4] See O'Brien, 289; Coppée, 40.

Action upon the Proceedings—***In general.*** Art. 66 of the code of 1806, following in substance the earlier forms, provided that the officers convening regimental and garrison courts should "decide upon their sentences." A similar provision is not embraced in the present Arts. 81 and 82, but in Art. 104 it is declared—generally—that "no sentence of a court-martial shall be carried into execution" until the approval of the same by "the officer ordering the court," (or "the officer commanding for the time being;"[4]) and in Art. 109—also generally—that "all sentences of a court-martial may be confirmed and carried into execution" by such officer, &c. The proceedings and sentences, therefore, of the courts authorized by Arts. 81 and 82 are to be reviewed and acted upon by the commanders indicated therein respectively. The principles set forth in Chapter XXI, as governing the subject of the authority, discretion, and duty of the Reviewing Officer, will apply in general to the action of these commanders.

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[1] In the original Article of 1775 and 1776, it is declared in express terms that regimental courts "shall give judgment," and "determine upon the sentence, by the majority of voices."

[2] Par. 1037 Army Regs., being expressed in general terms, governs as to the form of authentication of both kinds of courts. The statement sometimes made, (see Coppée, 42,) that the members *all* sign, is not correct.

[3] According to the general rule laid down in par. 1041, A. R.

[4] As to the meaning of this term, and the construction, generally, of Arts. 104 and 109, see Chapter XXI.

Form of action. Par. 1041 of the Army Regulations, referring to courts-martial in general, declares that the reviewing officer "shall state at the end of the proceedings in each case his decision and orders therein."[1] The form of this action, as subscribed in or upon the proceedings of an inferior court, is substantially the same as that adopted in expressing the action taken upon a case tried by a general court, only that it is usually briefer and simpler. Some commanders, in approving the sentence, content themselves with writing and subscribing the single word "Approved," at the end of the record—a form, however, not generally advisable.

Power to return proceedings for correction. As in the instance of a case tried by a general court-martial, the convening authority, (or his successor in command,) is empowered to return the proceedings to the court, (reassembling it if necessary,) for revision and the correction of errors.[2]

Power of pardon and mitigation. Art. 112, in empowering officers authorized to act upon the sentences of *general* courts to remit, &c., the same, adds:—"*Every officer commanding a regiment or garrison in which a regimental or garrison court-martial may be held, shall have power to pardon or mitigate any punishment which such court may adjudge.*" What has been said, therefore, in regard to the nature and extent of this power in Chapter XXI will in general apply here. It may be repeated that, in the opinion of the author, power is given by this Article, not only for the pardon or mitigation of a punishment or punishments by the officer in command at the time of and in connection with the original action and approval, but also for the pardon or remission of the same by such officer or his successor, at any time thereafter before the sentence is fully executed. The beneficial nature of the provision justifies a liberal construction, and the practice has sustained this interpretation.

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[1] In Lt. Col. Robertson's case, one of the offences with which the accused was charged, and of which he was convicted, was—"permitting sentences of regimental courts to be carried into execution, without affixing his approval to the proceedings of the same." James, 828; Simmons § 720, note.

[2] Par. 1043, Army Regs., is expressed in general terms, thus embracing *all* courts-martial. See this subject as treated in Chapter XXI.

Promulgation. The proceedings, in our practice, are published by the commanding officer of the regiment, garrison, &c., to the command, in a regimental or post, &c., general order, the form of which follows in substance that of the General Order by which the proceedings of the superior courts are commonly promulgated.

Action not subject to supervision. Arts. 109 and 112 vest, as has been seen, in regimental and garrison commanders the power to confirm and execute, as well as pardon or mitigate, the sentences of the courts ordered by them under Arts. 81 and 82. Upon a familiar principle of interpretation this power is to be regarded as *exclusive:* no superior authority, therefore, can legally reverse or revise their action. The Army Regulations, indeed, of 1863, contained two paragraphs, (numbered 898 and 899,) which declared that such commanders should transmit the proceedings of these courts to the department headquarters "for the supervision of the department commander," and, again, that the latter might in certain cases "suspend" the execution of the sentence. Par. 899, however, which contained the latter provision, was held by Judge Advocate General Holt to be void and inoperative because in conflict with the Articles of war, and this opinion was concurred in by the Secretary of War.[1] In the later authorized editions of the Regulations, those of 1881 and 1889, not only was par. 899, but also par. 898 of 1863, wholly omitted; the last apparently as being subject to the same legal objection as the other. In the opinion of the author, the latter regulation was as properly required to be omitted as the former. An army regulation is inferior in force to an Act of Congress, and such an Act having vested in regimental, &c., commanders the exclusive power to finally act upon and fully execute the sentences of inferior courts, their action cannot, by an army regulation, be made subject to the revision of superior or other authority. Par. 898 of 1863 was thus an illegal assumption and of no effect, and has properly been abandoned. Thus, at military law, the action of the commanders authorized to pass upon the proceedings and sentences of the inferior courts is as exclusive and final as is the action of the class of commanders authorized to pass upon the proceedings and sentences of general courts-martial.

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[1] In G. O. 72 of 1873.

Disposition of Records. Par. 1041 of the Army Regulations declares, generally, that—"the judge advocate shall transmit the proceedings without delay to the officer having authority to confirm the sentence." A provision of the Act of March 3, 1877, directs that all records of inferior courts shall, "*after having been acted upon, be retained and filed in the judge advocate's office at the headquarters of the department commander in whose department the courts were held, for two years, at the end of which time they may be destroyed.*" This provision was enacted in view of the fact that the Bureau of Military Justice had become gradually burthened with a vast mass of such records, the accumulation of which it was desirable to discontinue. Under this Act, regimental and garrison commanders, after having finally acted upon the proceedings and sentences of the courts ordered by them, transmit the records to department headquarters to be disposed of as prescribed.

II. THE FIELD OFFICER'S COURT.

Its Nature in General. This is a distinct species of tribunal from the Regimental or Garrison Court, differing from the latter mainly in that (1) it is authorized only for time of war, (when it takes the place of the regimental or garrison court whenever it can practicably be convened:) (2) that its sentences are not ordinarily executed by the simple order of the convening officer, but may require, to give them effect, the approval of a higher commander. As will be seen, however, it is assimilated to the Regimental Court authorized by Art. 81, being itself a simple form of regimental court provided for periods when a summary disposition of cases of minor offenders is especially called for.[1]

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[1] Except as to the formality required for the execution of its sentences, this court resembles the "Drum Head," or "Field Court-Mar-

The Law on the Subject. This special agency for the administration of military justice was inaugurated during the late war by the Act of July 17, 1862, c. 201, s. 7. The provisions of this statute were incorporated in the code of Articles of 1874, and the existing law relating to this court is contained in Arts. 80, 83 and 110, as follows:—

"ART. 80. *In time of war a field officer may be detailed in every regiment, to try soldiers thereof for offences not capital; and no soldier, serving with his regiment, shall be tried by a regimental or garrison court-martial when a field officer of his regiment may be so detailed.*

"ART. 83. * * * * * * *Field officers detailed to try offenders shall not have power to try capital cases or commissioned officers, or to inflict a fine exceeding one month's pay, or to imprison or put to hard labor any non-commissioned officer or soldier for a longer time than one month.*

"ART. 110. *No sentence of a field officer, detailed to try soldiers of his regiment, shall be carried into execution, until the whole proceedings shall have been approved by the brigade commander, or, in case there be no brigade commander, by the commanding officer of the post.*"

Art. 83, which applies alike to all inferior courts, have been fully considered in the first part of this Chapter, in treating of the Jurisdiction and Power of punishment of Regimental and Garrison Courts.

Constitution of the Court. The Articles are silent as to the officer by whom the Field Officer may be detailed as a court. Following, however, the analogy between this and the Regimental Court, it would seem clear, as held by Judge Advocate

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tial," formerly known in the English practice. As to the existence and procedure of this summary tribunal, which was held, without regard to the usual forms, in "cases supposed to require an immediate example," see reference in Adye, 97; Mil. Law of Eng., 56; Simmons § 251; Hough, 235; Id., (P.) 554, 683, 686–7, 797–9; D'Aguilar, 77; Gov. Wall's Case, 28 How. St. T., 151; Picton's Case, 41 Hansard's Debates, (3) 1271, 1273. That a resort to a Drum Head Court was considered to be permissible only in an emergency, as during war or the occasion of a mutiny, see case of Col. Allan, convicted of the offence of employing such a court in cases not justifying it. Hansard, N. S., vol. VIII, p. 490. Debate in Ho. of Com., 1823. No such court has ever been sanctioned in our law or practice.

General Holt,[1] that it was intended that the regimental commander should make the detail where practicable; *i. e.* where there is, besides himself, at least one other field officer of the regiment present and serving with it. In the absence of such an officer, the court, (the regimental commander not being authorized to detail himself,) must, if detailed at all, be detailed by superior authority; and it may be inferred, from the provision of Art. 110 in regard to the taking of action upon the sentence by the brigade (or post) commander, that such commander would be, under the circumstances indicated, the proper authority to make the detail.[2] Upon this point the law is incomplete. *In practice*, Field Officers' Courts, where resorted to, have commonly been detailed by commanders of regiments. Where it has been impracticable to convene them on account of the want of material, or where, because the regiment was not embraced in a brigade or post command and its sentence could not therefore be executed, it would have been futile to have done so, the ordinary regimental or garrison court, or a general court, has been convened instead; and, in convening the former court, the order, in view of the concluding provision of Art. 80, has usually specified in terms that it was "impracticable to detail a Field Officer."

It is evident that an officer having a command which is less than a regiment, or which though greater does not embrace a regiment, is not empowered to detail a Field Officer under Art. 80.

Composition. The court must consist either of a colonel, lieutenant-colonel, or major, or of an officer who, though of a lineal rank inferior to major, has the brevet rank of a field officer and has been duly assigned to duty according to his brevet rank. Such assignments, however, are rarely if ever made in regiments, and, in practice, the, (or a,) *major* of the regiment has commonly been detailed for the court. A captain, who is merely *acting* as major, cannot legally be so detailed.

Further, from the terms of Arts. 80 and 110, it is clear that the

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[1] DIGEST, 90–91.

[2] In some instances during the late war, *department* commanders detailed these courts, or ordered them to be detailed. See G. O. 24, Dept. of the Cumberland, 1862; Coppée, 43.

Field Officer must be a *regimental* officer and an officer of the regiment to which the parties tried belong, and that a *staff officer* is not eligible for the detail.

Jurisdiction. As has been remarked, the jurisdiction of the Field Officer is restricted to time of war. He cannot therefore legally be detailed under Art. 80 in time of peace. As to the persons within his jurisdiction, these, as indicated by the Article, are the enlisted men of the regiment in and for which he is detailed as a court. The regiment is the exclusive field of his jurisdiction and its limit. While he may try soldiers of the different companies of the regiment though serving at separate stations, &c., provided they are all under the command of the regimental commander, he may not try members of the regiment who are *detached* from it and serving with other and distinct commands. In brief, both as to offenders and offences, his jurisdiction is identical with that, heretofore defined in this Chapter, of the Regimental Court of three officers authorized by Art. 81.

Power of Punishment. The authority also of the Field Officer to award punishment upon conviction is made, by Art. 83, the same as that vested in the other inferior courts and already considered in this Chapter.

Procedure—***No oath required.*** Neither the 84th[1] nor other Article of the code requires that the Field Officer shall be specially sworn as a court, and in practice he has never been sworn as such.

No judge advocate detailed. Under the general authority of Art. 74, a judge advocate may probably be as legally detailed to attend a Field Officer's as a regimental or garrison court. In practice, however, no judge advocate or recorder has ever been so detailed. The Field Officer himself performs the whole duty of the court—conducts the investigation and keeps the record.

The form of the record. The original Act of 1862 expressly provided that the Field Officer "*shall make a record of his proceedings*," and Art. 110 declares that no sentence adjudged by a

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[1] The "regimental" court referred to in this article is evidently the old regimental court of three officers, of Art. 81; the only one in existence when the original of Art. 84 was enacted.

Field Officer "*shall be carried into execution until the same shall have been approved by the brigade commander*," &c. As to the record of proceedings to be made by the Field Officer, this, in view of the summary nature of his action, need only be, and has in practice been, of a brief and simple character. Unlike the records of other inferior, or of general, courts, his record does not ordinarily set forth the testimony, when any is taken, nor does it contain any reference to the affording to the accused of an opportunity for challenge, the Field Officer not being liable to challenge. In other respects the record will properly follow the essential features of the records of other courts, setting forth such particulars as are requisite to exhibit the authority and the action of the Officer. It will thus properly recite the order of detail, the names, &c., of the offenders tried, their offences as charged and their pleas, the findings of the court and the punishments adjudged upon conviction; the whole being authenticated by the Officer's signature.

Action upon the Proceedings. Art. 110, in making it essential to the legal execution of the sentence that the proceedings shall first be approved by the brigade, (or, if there be none, the post,) commander, is construed, upon the familiar principle of *expressio unius exclusio alterius*, as confining the authority of approval to the particular commanders named,—excluding therefrom, for example, a division or department commander.[1] Where, therefore, a regiment is a part neither of a brigade nor a post command, it will, as already remarked, be quite useless for the regimental commander to detail a field officer as a court, since no punishment adjudged by him can take effect: some other court will therefore properly be resorted to.

The Article requiring that the proceedings and sentence, to be operative, shall be approved by the brigade (or post) commander, it follows that where he *disapproves* the proceedings, the same, as in the case of the proceedings of a general court, are rendered nugatory[1] and no punishment can be enforced. Where the proceedings are *approved* by such commander, the execution of the sentence will in general properly be devolved upon the regimental commander.

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[1] Proceedings of Field Officers' Courts have indeed been published as acted upon and approved by department (and district) commanders in sundry General Orders, of which the greater number were G. O. of the First Military District, of 1868–9. This was, however, before the publication of the Articles of 1874, in which the law on the subject of the action upon the proceedings of these courts is more succinctly expressed than in the Act of 1862.

Pardon and Mitigation. The present Articles of war—in Art. 112 or elsewhere—fail to authorize the convening officer or other military commander, or the Field Officer, to pardon or mitigate punishments awarded by the latter.[2]

III. THE SUMMARY COURT.

This Court, of which the title is taken from that of courts of the same name, (but otherwise quite different, especially in their composition and power of punishment,) in the British law and our own Naval code, was established by an Act of Oct. 1, 1890, c. 1259, s. 1, (entitled "An Act to promote the administration of justice in the Army,") which provides as follows—"*That hereafter in time of peace all enlisted men charged with offenses now cognizable by a garrison or regimental court-martial shall, within twenty-four hours from the time of their arrest, be brought before a summary court, which shall consist of the line officers second in rank at the post or station or of the command of the alleged offender, and at stations where only officers of the staff are on duty the officers second in rank shall constitute such court, who shall have power to administer oaths and to hear and determine the case, and when satisfied of the guilt of the accused party adjudge the punishment to be inflicted. There shall be a summary court record-book or docket kept at each military post, and in the field at the headquarters of the command, in which shall be entered a record of all cases heard and determined and the action had thereon, and no sentence adjudged by said summary court shall be executed until it shall have been approved by the post or other commander: Provided, That when but one commissioned officer is present with a command he shall hear and finally determine such cases as require summary action: Provided further,* * * * * *That*

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[1] Except of course that they may be pleaded as a "former trial." See Chapter XVI, *ante.*

[2] The "regimental" court referred to in Art. 112 is evidently the court, commonly designated by that title, authorized by Art. 81. See note *ante*, as to the "regimental" court referred to in Art. 84.

any enlisted man charged with an offence and brought before such summary court may, if he so desires, object to a hearing and determination of his case by such court and request a trial by court-martial, which request shall be granted as of right, and when the court is the accuser the case shall be heard and determined by the post-commander, or by regimental or garrison court-martial: And provided further, That post and other commanders shall, on the last day of each month, make a report to the department headquarters of the number of cases determined by summary court during the month, setting forth the offences committed and the penalties awarded, which reports shall be filed in the office of the judge advocate of the department."

An amendatory Act of July 27, 1892, provided—"*That the commanding officers authorized to approve the sentences of summary courts, shall have the power to remit or mitigate the same.*"

Purpose of the Court—*Exceptions to its use.* This court is intended as a substitute, in time of peace, for the regimental or garrison court[1]—mainly as a substitute for the garrison court in post commands. Inasmuch as the Act declares that, "in time of peace, all enlisted men, charged with offences cognizable by a garrison or regimental court-martial," shall be brought before this court for trial, except under certain circumstances further specified, it results, and has been so ruled by the Secretary of War,[2] that whenever, (in time of peace,) a garrison (or regimental) court is ordered in the case of an enlisted man, the order should state the fact which brings the case within one of the excepted classes, "and thus makes it a legal court." Thus the order should specify either that the accused, having been "brought before" a summary court, "objected to a hearing and determining of his case by such a court and requested a trial by a" regimental or garrison court, as the case may be, (which request the Act declares is to be "granted as of right;") or it should set forth that the officer composing the summary court which would have tried the case is the "*accuser*"[3] therein of the accused, in which contingency the Act declares that the case

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[1] See opinion of Solicitor General of March 14, 1892, published in G. O. 27 of 1892.

[2] Circ. No. 9, (H. A.,) 1891.

[3] See this term defined in Chapter VI.

"shall be heard and determined (by the post commander or) by a regimental or garrison court-martial." A third instance would be that—not provided for by the Act or other statute, but initiated by par. 254 of the Army Regulations[1]—where the accused, being a sergeant, objects to be tried by a summary (or other inferior) court; in which case it is declared that he shall not be so tried except by special permission of the authority competent to order his trial by general court-martial. But this regulation is at variance with the provisions of the Act, since under the Act a non-commissioned officer is amenable to trial in the same manner and to the same extent as a private soldier, and therefore without any reference to the department or other commander, such as is indicated, being necessary or material.

Constitution. The summary court, like those for which it is a substitute, will be ordered either by the commander of a regiment or "corps," or by a post commander—in general by the latter. The Act seems also to contemplate the possibility of a command other than a regimental, or corps, or post command—one answering for example to that of a "place where the troops consist of different corps," specified in Art. 82, of which the commander may be authorized to convene a summary court; but such a contingency must be a rare one in a time of peace.

Composition. Under the provisions of the Act of 1890, a summary court will ordinarily consist of the line officer second in rank at the post, station, or command of the offender. Or, where there are only staff officers on duty at the station, it will consist of the staff officer second in rank.[2] The presence however of a line officer on duty at the same post will render a staff officer also on duty there ineligible to act as such court; thus he cannot legally sit as such where the post commander is a line officer. Where there is "but one commissioned officer present with a command," that officer, who will necessarily be the commanding officer, will officiate as the court. So, where a line (or staff) officer, second in rank, detailed as the court, is the "accuser" of the party to be tried, the court must be composed of the post commander, who will thus detail himself. If indeed the post commander, being the only officer present with the command, occupies the attitude of accuser, there can be no summary court, and the case under the Act must go to a garrison or regimental court.[1] But, unless specially requested, a garrison, &c., court will not be legal where the post commander can officiate.

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[1] As amended by G. O. 67 of 1893. And see G. O. 47 of 1894.

[2] The medical officer second in rank at a hospital post, (where there were no line officers,) would thus be eligible for this court.

Jurisdiction. It is clear from the terms of the Act that the jurisdiction of the summary court is intended to be the same as that of the regimental or garrison court, subject to the same limitations as prescribed in Art. 83. It has legal cognizance, therefore, of all offences committed by enlisted men of the command of the convening authority which would be cognizable by a garrison or regimental court. The classes of offences which are excepted from its jurisdiction are thus the same as those specified in considering the jurisdiction of the other inferior courts. It has been ruled that as the jurisdiction of the summary court extends to enlisted men only, the discharged soldiers held as convicts at the late Military Prison, at Leavenworth, Ks., being civilians, were not amenable to trial by such court.

Procedure. In General Order No. 29 of 1891, it is directed as follows—"Soldiers against whom charges may be preferred for trial by summary courts shall not be confined in the guard house but shall be placed in arrest in quarters, before and during trial and while awaiting sentence, unless in particular cases restraint may be deemed necessary." This direction is repeated in almost identical language in the more recent G. O. 16 of 1895.

The Act of 1890 provides that such soldiers shall be brought before the summary court "within 24 hours from the time of their arrest." It has been remarked in Orders that the limit here specified is not twenty-four hours from the commission of the offence but from the arrest only, and that as arrest may be deferred in the discretion of the commander, the period between offence and trial may thus be considerably prolonged beyond twenty-four hours without affecting the legality of the proceedings. The provision is a *directory* one, not one affecting jurisdiction, and it has been held by the Secretary of War that it is for the responsible commanding officer, not the court, to determine when cases should be brought to trial; and that a delay of more than twenty-four hours in causing an offender to appear before the court is not pleadable in defence by the accused, though if such delay be protracted, the fact may well be put in evidence as ground for mitigation of punishment.[1]

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[1] See Circ. No. 1, (H. A.) 1891.

It is further declared, in the same connection, as follows—"Summary courts should be opened at a stated hour every morning, except Sunday, for the trial of such cases, if any, as may properly be brought before them. Trials should be had on Sunday only when the exigencies of the service make it necessary."[2]

In G. O. 47 of 1894, it is directed that—"When charges are preferred against an enlisted man for offences cognizable by inferior courts-martial, they will be laid before the post commander, who, if he thinks that the accused should be tried, will cause him to be brought before the summary court. Here he will be arraigned and allowed to plead, according to the practice of courts-martial." Unless he pleads guilty, "witnesses will be sworn and evidence received, the accused being permitted to testify in his own behalf and make a statement; but the evidence and statement will not be recorded." The officer acting as the court "shall," to cite from the Act of 1890, "have power to administer oaths and to hear and determine the case, and, when satisfied of the guilt of the accused party, adjudge the punishment to be inflicted." The oaths here referred to are those of the witnesses: though the trial officer is not himself sworn, the witnesses must be.

By further decisions of the Secretary of War, it is held to be "the duty of the officer who brings charges before a summary court for trial to submit evidence of previous convictions, or to cite them when the convictions have been by the same court."[3] In G. O. 47 of 1894, it is declared that "the proper evidence of previous convictions by summary court is the copy of the summary court record furnished to company and other commanders, or a copy of the summary court record specially furnished for the purpose and certified to be a true copy by the post commander or adjutant."[1] But, as remarked in the Circular cited of 1892, the officer acting as the court "may take judicial notice of what appears upon the record of his own court."

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[1] Circ. No. 2, (H. A.,) 1891; Do. of 1892.

[2] Circ. No. 2, (H. A.,) 1891.

[3] Circ. No. 2, (H. A.,) 1892.

Punishment. The power of punishment of the summary court is the same as that of the other inferior courts, and is thus subject to the limitations prescribed by Art. 83. So, in view of the provision on the subject contained in Art. 4, it cannot adjudge dishonorable discharge. The authority which the Act of 1890 vests in the President "to prescribe specific penalties for such minor offences as are now brought to trial before garrison and regimental courts-martial," has not been exercised further than by the fixing of *maximum* punishments, by G. O. 21 of 1891, (amended by G. O. 16 of 1895,) made pursuant to the Act of September 27, 1890.

Action. It is further provided in the Act establishing this court that—"No sentence adjudged by said summary court shall be executed until it shall have been approved by the post or other commander"—a provision substantially equivalent to that of the 104th Article of War. The power of disapproval includes of course *disapproval;* and we have seen that the commanders authorized to approve the sentences of such courts may now also "*remit or mitigate*" the same. In G. O. 47 of 1894, it is announced that—"When a post commander sits as a summary court, no approval of the sentence is required by law, but he should sign the sentence as post commander and date his signature."

Record. A form for the record of a summary court is prescribed in G. O. 47 of 1894, for which blanks are furnished from the Adjutant General's Office.[2] It sets forth in each case the name, &c., of the accused, the charge or charges with a synopsis of the specifications, the finding, the sentence authenticated by the signature of the trial officer, and the "action of commanding officer with date and signature." The testimony, as we have seen, is not recorded. The trial officer keeps his own record, but may be assisted by a clerk from the Post Adjutant's Office when requisite.[1]

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[1] In G. O. 16 of 1895, it is directed that—"in the cases of conviction by summary court, * * a duly authenticated copy of the record of said court shall be deemed sufficient proof."

[2] Circ. No. 9, (H. A.,) 1894.

Discretion in the use of the Summary Court. While the institution of this court provides a ready and effective means of trial and punishment for minor offences, it is yet not essential that it should be resorted to in any case, and it is discretionary with the proper commanding officer to determine what cases shall be referred for trial thereby, and what ones shall be disposed of by the exercise of the disciplinary power of "admonition or the withholding of privileges and indulgences."[2] But, as it is remarked by the Major General Commanding, in an Order of 1892[3]—"The increasing number of trials by summary court and the trivial character of many of the offences tried indicate that commanding officers frequently fail to make use of this power. They are therefore reminded that it is their duty to use all reasonable means to prevent the occurrence of delinquencies rather than to punish them. In the discharge of this duty they may not only deprive unworthy soldiers of privileges, but take such steps as may be necessary to enforce their orders. It is believed that the proper use of this power will make it unnecessary to bring before the summary court many of the trifling delinquencies which are now made the subject of trial; indeed, that such trifling delinquencies will in great measure be prevented. Department commanders will see that their subordinate commanding officers fulfill their duties in this regard."

MILITARY BOARDS.

Beside the Boards of government, examination, inspection, investigation, &c.,[4] constituted by law or convened from time to time by the President or military superiors in the exercise of their commands, and not calling for special notice in this treatise, there are two more important species of Boards, one authorized by statute and one by army regulation, of which brief mention should here be made. These are Retiring Boards and Boards of Survey.

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[1] Circ. No. 1, (H. A.,) 1891.

[2] Circ. No. 13, (H. A.,) 1891.

[3] G. O. 73.

[4] As, for example, the boards authorized or recognized in the Rev. Sts., Secs. 1160, 1172, 1196, 1206, 1208, 1214, 1325, (Academic Board of the Military Academy,) 1327, (Board of Visitors to the Academy,) 1345, (Board of Commissioners of the Military Prison;) and in the Acts of June 23, 1874, June 18, 1878, &c.; also the Board of Ordnance and Fortification, established by the Act of Sept. 22, 1888; the Boards for the examination of officers for promotion, authorized by the Act of Oct. 1, 1890; the Boards for the examination of enlisted men for ap-

RETIRING BOARDS.

The law on the subject. The matter of retirement in the army, which is a form of compensation for public service, is, like the matter of pay, regulated by positive enactment.[1] Retiring Boards are bodies constituted and empowered, and whose duties are prescribed, under and by Sections 1246 to 1253 of the Revised Statutes.[2] These statutes provide—that the Secretary of War, under the direction of the President, shall, from time to time, assemble such boards, of from five to nine officers, two-fifths of whom shall be medical officers; the members other than medical to be, "as far as may be, *seniors in rank* to the officer whose disability is inquired of;"—that "the members of the board shall be *sworn* in every case to discharge their duties honestly and impartially;"—that the board, for the purposes of the investigation of the matter of the disability and incapacity of officers, "shall have such *powers* of a court-martial and of a court of inquiry as may be necessary;"—that the board shall *find* upon the questions of the incapacity for active service of the officer, the cause of his incapacity, and whether or not such cause was an incident of the service;—that the *approval* of the President shall be necessary to give effect to the finding of the board;—that the President, in approving, shall *retire* the officer *from active service* merely, (if

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pointment as officers, authorized by the Act of July 30, 1892, and regulated by G. O. 79 of 1892; the Board for the inspection of recruits, provided by par. 928 A. R., as amended by G. O. 42 of 1893; and sundry lesser boards. With these also are to be classed the Post and Regimental Councils of Administration, (Art. XXXIII, A. R.) As to these last see Kautz, Customs of the Service, 158–169.

[1] See McBlair *v.* U. S., 19 Ct. Cl., 528.

[2] Similar provisions as to *naval* retiring boards are contained in Secs. 1448 to 1453, Rev. Sts.

It may be noted that retirement on account of *age* or *duration of service* is a proceeding wholly distinct from retirement for disability as ascertained by a board: for the former no inquiry is necessary other than a reference to the officer's military record.

found to have been incapacitated by an incident of the service,) or, (if not so found,) may, in his discretion, "*wholly retire*" him, *i. e.* drop him from the army, and remit him to the status of a civilian;[1]—that no officer whose case is inquired into by a retiring board shall be retired "without a *full and fair hearing*" before the board, if he demand it.

Composition. The provision, above cited, of Sec. 1246, that the members, other than medical, "shall, as far as may be," be "seniors in rank to the officer whose disability is inquired of," is analogous to the provision of the 75th Article of war in regard to the rank of the members of a court-martial, and is to be similarly construed.[2] As in that case it is to be considered that the statute is directory only upon the convening authority; that it is for him to determine the matter of the rank of the members; and that his detail of officers for the board, as shown by his order, is conclusive evidence that, so far as the interests and exigencies of the service have permitted, seniors in rank have been selected.

Swearing of members. The statute,—Sec. 1247,—though requiring that the members shall be sworn, does not specify how or by whom. No provision is made for a judge advocate or recorder, nor is the senior or the junior member empowered to qualify the others. *In practice*, however, a recorder is detailed with the board; and inasmuch as, by Sec. 1248, the board is invested with the "powers" of a military court, the swearing is in general proceeded with as indicated in the 117th Article of war. Following, however, the terms of Sec. 1247, the members need but to be simply sworn "to discharge their duties honestly and impartially."

Powers. The provision that the board "shall have such powers of a court-martial and of a court of inquiry as may be necessary," &c., is indefinite, but has given rise to but little question in practice. Construing it in connection with the other provisions cited, its evident intention is seen to be that the board shall have and exercise such powers of a "court" as may be requisite to insure a full investigation, to afford a fair hearing, and to enable it satisfactorily to determine the questions referred. Thus it is properly authorized and empowered to call for and entertain such testimony of witnesses, depositions, documents or papers, as may be material to establish or illustrate the nature or extent of the disability,[1] to pass upon questions of admissibility of evidence, to grant continuances, to give the officer ordered before it a reasonable opportunity of defence if desired, to find and report in his absence if he fail to appear; and further to determine the relevancy and validity of challenges to its members and punish acts in the nature of contempt, according to Arts. 86 and 88, if necessary to an impartial and complete inquiry. But the board cannot entertain a charge of a military offence as such, nor assume to *try*. The disability which it is to inquire into is an existing physical or mental incapacity, not a moral defect or a criminal amenability. If the case be one calling for trial and punishment, it should be referred to a court-martial.[2]

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[1] As to the effect of "wholly retiring," as a form of summary dismissal, see Miller *v.* U. S., 19 Ct. Cl., 353, also *post*, Chapter XXV—"Ninety-Ninth Article."

[2] See Chapter VII—"Composition of General Courts Martial."

The hearing. In view of the provision of Sec. 1253, in regard to the "full and fair hearing" to be afforded, the board will properly give every officer ordered before it such a hearing if he desire one,[3]—allowing him to introduce all reasonably material evidence as to the causes and circumstances of the alleged disability and his acts and record in the service, to cross-examine witnesses and interpose objections to testimony offered on the part of the military authorities, to be assisted by counsel, and to make argument or statement. There will, rarely, however, be an *issue* before a retiring board where the officer is ordered before it upon his own application; otherwise perhaps where the proceeding is *in invitum*.[4] In the latter case, if upon due notice the officer fails to appear, he will be held to have waived his right to a "hearing," and he cannot take exception to a conclusion arrived at in his absence.

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[1] The investigation is not affected by the statute of limitations—Art. 103.

[2] Compare Sec. 1450, Rev. Sts., as to the *Navy*.

[3] As to the importance of such hearing, see 16 Opins. At. Gen., 20. It may be remarked that the law of this opinion is somewhat questionable, in the light of later opinions and rulings. See *post*.

[4] "When the President approves and acts upon the report of a retiring board," and makes his order retiring the officer, "he thereby determines that the officer has had 'a full and fair hearing.' * * * Such determination must be assumed as the basis of his order." Miller *v.* U. S., 19 Ct. Cl., 339, 349.

The finding. Though Sec. 1250, Rev. Sts., refers to the finding as the "*decision* of the board," and Sec. 1248 authorizes the board to "*determine* the facts," it is clear, from these sections and Sec. 1249, that the finding is but in the nature of a recommendation, without force or effect unless approved by the President and acted upon by him accordingly. Like a court-martial, the board may reconsider and modify its finding at any time before transmitting its "proceedings and decision" to the Secretary of War, under Sec. 1250.[1]

Action. The action of the President is prescribed by Secs. 1251 and 1252, as above indicated. In any case in which, in his judgment, the investigation has not been complete, or the finding is not justified by the facts, he may, before acting thereon,[2] return the proceedings to the board for a further inquiry or hearing, or a correction of its conclusions, as in a case of a court-martial. But not being a court, and the inquiry not being a *trial*, the board, upon such revision, may, and should if so directed, re-examine former witnesses or take new testimony.

It is now fully settled that where the President has finally approved the finding of a retiring board, and has acted thereupon by making his order retiring the officer in one of the forms authorized by the statute, his power is exhausted. He cannot then reopen the case, nor, though the order made was mistaken or unjust, can he revoke it and substitute another otherwise retiring the officer. If he does so, the second order will be void and inoperative. The action of the President, whose authority in such a case is, in the language of the Supreme Court, "wholly dependent upon the letter of positive enactment," is "equivalent to the judgment of an appropriate tribunal upon the facts as found, and cannot be disturbed." If injustice has been done, relief can be afforded by Congress alone.[1]

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[1] That the board is not empowered to modify its finding after it has been completed and the board has thereupon adjourned—as held, in a naval case in 16 Opins. At. Gen., 104—is not regarded as an accurate statement of the law. A court-martial of the army may modify at discretion, and reverse, its finding, after completing it, provided the report is still with it, and not transmitted to the reviewing authority; and the same rule should apply here. Sec. 1452, Rev. Sts., relating to the disposition of the proceedings of retiring boards of the navy, corresponds to Sec. 1250 of the law governing retiring boards of the army.

[2] He cannot of course do so *after* he has approved and acted on the report. Miller *v.* U. S., 19 Ct. Cl., 338.

BOARDS OF SURVEY.

These are advisory boards, composed generally of three officers, authorized by the Army Regulations to be convened by commanding officers, for the purpose of investigating the cause and fixing the responsibility in cases of deficiency or damage of public property entrusted to officers or soldiers, or furnished for military use; of fixing and recommending amounts of stoppages or debits therefor; of verifying discrepancies, if any, where such property is transferred from one officer to another; of making inventories of such property when required to be abandoned or when the officer in charge has deceased, and for other purposes indicated in the Regulations.

The regulations on the subject are mainly contained in Title LX of the Army Regulations of 1889.[2] These regulations are so specific as to call for but little comment.

Province and duty in general. The main object and use of a board of survey is to decide whether a certain officer, soldier or other person, shall be charged with the amount, (fixing it,) of a particular loss, deficiency, or damage to public property, or relieved from liability therefor;[1] or to determine a question of responsibility for property as between two or more officers, soldiers, or other persons. While such a board is not a court and cannot try, convict, or acquit, but can advise or recommend only,[2] it may, like a court of inquiry, report facts and conclusions which will properly form the basis for a military charge or a civil prosecution. It is important, therefore, that it should investigate,[3] as thoroughly as its want of power to swear witnesses will permit,[4] and report, the full testimony bearing upon the question at issue. Thus where public stores received at a military station are found to be deficient or damaged, the board of survey, (which should be convened without delay,) should make so extended and complete an investigation as that it shall, if practicable, satisfactorily be made to appear from its report what party,—whether original sender, intermediate forwarding officer, contractor for supplies or transportation, common carrier or other agent, or consignee or actual receiver,—is the person really accountable for the loss, damage, or demurrage.[5] To facilitate the solution of the question, the board should annex to their report all material bills of lading, invoices, and receipts, specify the routes and modes of transportation, state the names and marks on the packages, &c.[6] If the loss was the fault of no person, but was incurred through the violence of the elements or the operations incident to a state of war, or "some contingency of the service,"[1] this fact should be made fully to appear.

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[1] U. S. *v.* Burchard, 125 U. S. 179–180; Id., 19 Ct. Cl., 138; Potts *v.* U. S., 125 U. S., 175; Miller *v.* U. S., 19 Ct. Cl., 338; McBlair *v.* U. S., Id., 529; 19 Opins. At. Gen., 203. "The finding of the retiring board, approved by the President, is the judgment of the tribunal created under the law to determine such questions." Potts *v.* U. S. "The finding, approved by the President, fixes the fact that an officer's incapacity was or was not caused by the service, and the fact once fixed cannot be reviewed." Burchard *v.* U. S., 19 Ct. Cl., 138. "Upon the report of the Board the President had the right to adopt one of three courses with the claimant; he could disapprove the finding, and thereby retain the claimant in the active service, retire him from active service, or *wholly* retire him from the Army, as he might determine. He had a power to exercise in the disposition of the report, and his action thereon made in law the complete exercise of the full measure of authority provided by the statute. It is not a *continuing* power, but is performed to the extent or its existence by the *one* act of the President." McBlair *v.* U. S., p. 538. And compare *Ex parte* Randolph, 2 Brock., 473; People *v.* Waynesville, 88 Ills., 470, cited in 19 Opins., 209.

[2] And see also pars. 117, 751–753, 781, 782, 787; G. O. 11, 37, and Circ. No. 9, (H. A.,) of 1890; G. O. 6 of 1891; Circ. No. 22, (H. A.,) 1893; G. O. 10 of 1894.

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[1] See pars. 117, 751, 781, 782, 787, 788, 893.

[2] See pars. 793, 797.

[3] "They will rigidly scrutinize the evidence especially in those cases wherein property is alleged to have been stolen or embezzled," (par. 790.)

[4] The ruling of the Judge Advocate General, that boards of survey are not empowered to swear either themselves or witnesses, as published in G. O. 68 of 1873, is now incorporated in the Regulations, par. 792.

[5] Circ. 6, Dept. of Texas, 1865; G. O. 15, Id., 1871; G. O. 32, 52, Dept. of Dakota, 1867; Do. 12, Id., 1870; Do. 87, Id., 1873.

A *contractor* cannot be *bound*, without his consent, by the report of a board of survey. See Heathfield *v.* U. S., 8 Ct. Cl., 213. Otherwise where he has stipulated in the contract to be so bound. And in such case, the report, if not objected to by the contractor when a copy is furnished him, will subsequently be supported as sufficient by the courts, though it merely consist of a conclusion without statement of evidence or reasons. U. S. *v.* Shrewsbury, 23 Wallace, 508.

[6] Circ. 6, Dept. of Texas, 1865; G. O. 24, Div. of the Pacific, 1866. In addition to the Orders above cited, see further—as containing

The hearing. Where the investigation involves an inquiry into the acts or proceedings of a particular officer, or soldier, or a question of his accountability, he should be allowed to appear before the board and be fully heard in defence or explanation. While the board may receive in evidence affidavits where no better form of evidence is attainable, its investigation should, if practicable, be in no respect *ex parte*;[2] the person or persons interested being afforded a reasonable opportunity to file counter affidavits or introduce oral or written evidence.

Action. Provision is made in the Regulations for the approval or disapproval of the proceedings of the board by the post commander who has convened it, subject to revision by higher authority.[3] The approving officer will properly endorse upon, or state in connection with, the report, what action he may himself have taken in the case.[4] Thus it is specifically directed in several of the General Orders that he should cause carriers or contractors to be charged with the money value of property for which they are found by the board to be accountable, on the bills of lading before they are signed.[5] When the value, or amount of loss, of property involved, exceeds a certain specified sum, the proceedings are required to be acted upon by the department commander, to whom also they are in any case to be submitted

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instructions, &c., in regard to these boards—G. O. 33, Dept. of the Columbia, 1868; Do. 21, Dept. of Texas, 1875; Circ. 2, Fifth Mil. District, 1868; Circ., Dept. of Cal., March 20, 1872, Do., Id., Jan. 2, 1875; Kautz, Customs of the Service, 131–140.

[1] Par. 793, A. R.

[2] Compare Brannen *v.* U. S., 20 Ct. Cl., 219.

[3] Par. 794, 795, A. R.

[4] G. O. 12, Dept. of Cal., 1869.

[5] G. O. 12, Dept. of Dakota, 1879; Do. 12, Dept. of Cal., 1869. In the last Order it is said—"A failure to do so will throw the responsibility on the officer who may have signed the bill of lading without having first called for the board of survey, to examine into losses and fix responsibility thereof."

for completion, if requested by "an officer pecuniarily interested." If found, on examination, "to exhibit serious error or defect," they are further required to be submitted to the Secretary of War.[1]

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[1] See pars. 795, 797, 798.

CHAPTER XXIII.

THE RECORD.

The Law Relating to the Subject. Though courts-martial are, as we have seen,[1] not *courts of record* in any such sense as that in which the term is employed in the civil practice, it is yet the uniform usage of our service for all such courts, whether general or inferior, to make and render formal records of the proceedings of all cases tried by them. They are not in terms required by any statute to keep records, but that they will properly do so is clearly contemplated by the code in Arts. 104, 110, 111, 113, and 114,[2] which refer to the approving, forwarding, and preserving and furnishing copies, of the "proceedings" of military courts,—by Sec. 1199, Rev. Sts., which makes it the duty of the Judge Advocate General to receive, &c., such "proceedings,"—by Sec. 1203, Rev. Sts., which requires that the "reporter," thereby authorized to be appointed, "shall record" such proceedings,—by the Act of March 3, 1877, which provides for the disposition of the "records" of inferior courts,—and by the Act of October 1, 1890, in its provision for "a summary court record-book, or docket," &c.

The Army Regulations indeed are more explicit in their references to the record. Par. 1037 enjoins that—"Every court-martial shall keep a complete and accurate record of its proceedings," &c., and goes on to direct as to the authentication of "the record," and to indicate certain particulars which "the record must show." Par. 1038 directs that the record "shall be clearly and legibly written," &c. Par. 1039 directs as to the form in which "the record of the proceedings" shall be "endorsed," &c. Pars.

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[1] In Chapter V.

[2] Compare Arts. 120, 121, as to the "proceedings" of Courts of Inquiry.

1041 and 1042 direct as to the transmittal of the "proceedings" to the proper official. Par. 1043 refers to the revision and correction of the "record."

The custom of the service, however, to a much greater extent than regulation, must be the guide as to the form and substance of the statements and recitals in a record of a court-martial.

General Duty of the Court as to the Record. The record is the act and record of the *court*, not of the judge advocate. The latter is, here, but the ministerial officer who notes the proceedings under the court's direction. The record is not the history of a prosecution, but of an impartial investigation conducted by a body of officers in pursuance of the order of a competent superior and of an oath which requires them to conduct it faithfully. It is thus the court that makes the record and is responsible for it;[1] its responsibility consisting in the rendering of a full and accurate report of the facts and law developed on the hearing, completed by a final judgment in due form.[2]

Fundamental Rules for the making up of the Record. Two general rules properly governing the framing of the record may be specified at the outset, namely:—

1. The record must fully set forth all the proceedings had in the particular case. Thus it must include the original assembling under the Order or Orders convening and composing the court; the preliminary challenging, if any, and the action thereupon; the organization for the trial; the appointment of reporter or employment of clerk, if any, and introduction of counsel; the arraignment and pleas, with special pleas, if any, and disposition of same; the sworn testimony and written evidence, with the objections to its admission and rulings thereon; the closing arguments or statements; the finding and sentence; together with all motions, adjournments, continuances, proceedings for contempt if any,[1] proceedings upon revision if any, &c.; in short every material act, proposition, or occurrence, essential to perfect the history of the investigation as such, and to advise the reviewing authority as to all the questions of fact and law involved in the case.[2] The only acts of the court or members not properly embraced in the minutes are the discussions, votes, &c., had or given in secret session where the court is closed for deliberation upon its judgment or some interlocutory question. Such discussions are no part of the formal record;[3] and, as to the votes and opinions of members, the stating of these is precluded by Arts. 84 and 85. It is in fact only the *result* of a deliberation in secret session that it is to be entered upon the record.

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[1] G. C. M. O. 22, Dept. of the Colorado, 1893.

[2] See G. O. 3, Dept. of the Pacific, 1863; Do. 23, Dept. of the South, 1870. Courts-martial, (with their judge advocates,) have been not unfrequently censured by Reviewing Commanders, on account of material omissions and other errors appearing in their records. See, for example, G. O. 23, Dept. of the Mo., 1861, Do. 120, Id., 1867; Do. 23, Army of the Potomac, 1863; Do. 62, 76, Dept. of the Gulf, 1863; Do. 54, Dept. of the South, 1863; Do. 25, 38, 41, Northern Dept., 1864; Do. 16, Id., 1865; Do. 49, Dept. of the Susquehanna, 1864; Do. 10, Dept. of Pa., 1865; Do. 37, Middle Mil. Dept., 1865; Do. 41, Dept. of Fla., 1865; Do. 25, Dept. of So. Ca., 1866; Do. 54, Dept. of Dak., 1867; Do. 25, Id., 1868; Do. 5, Dept. of La., 1868; Do. 4, Dept. of the Lakes, 1867; Do. 5, Id., 1869; Do. 14, Dept. of Texas, 1876; Do. 29, Id., 1884; G. C. M. O. 2, Dept. of Arizona, 1883; Do. 31, Dept. of the Mo., 1885; Do. 26, Dept. of the Platte, 1894.

In general, however, the commander should first, where practicable, afford the court an opportunity to correct its errors, by the return to it of the record for *revision*. See Chapter XXI.

2. Each record must be an entirety. In other words, when several cases are tried by the same court, each and every record must be entire and perfect within itself; *i. e.* both in form and substance wholly distinct and separate from the record of every other case. Each record must be an original official document, finished and complete in all its details, with no particular left to be supplied by a reference to any previous or other record or paper, and as single and individual as if it were the record of the only case tried by the court.[4] This rule is illustrated by par. 888 of the Regulations, which directs that "the proceedings in each case will be made up separately;" that is to say that the records of the different cases tried shall not be consolidated or attached together as parts of a continuous report of the court, but prepared and transmitted as successive and independent communications.[1]

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[1] As to the form of the record of proceedings had for contempt, see Chapter XVII.

[2] See G. O. 11, Dept. of the Platte, 1868; Do. 51, Id., 1871; Do. 8, First Mil. Dist., 1868; Do. 3, Dept. of the Pacific, 1863; G. C. M. O. 45, Dept. of the East, 1893.

[3] O'Brien, 283.

[4] See G. O. 292 of 1863; Do. 2, Dept. of the Pacific, 1863; Do. 12, Dept. of the Gulf, 1866; Do. 120, Dept. of the Mo., 1867; Do. 5, 21, Fifth Mil. Dist., 1868; Do. 176, Id., 1869; Do. 7, Dept. of the South, 1869; Do. 74, Dept. of Dakota, 1869; Do. 29, Dept. of the Platte, 1869; Do. 51, Id., 1871; G. C. M. O. 70, Dept. of Texas, 1886. "The record in each case will be complete in itself." Par. 1037, A. R.

Details of the Record. Premising with the remark that the record, as indeed directed by the Army Regulations,[2] should be legibly and neatly written, we proceed to indicate the form and manner of exhibiting the several details of the same in their order.

Prefixing of copies of Orders. The original Order convening the court, constituting as it does the initial authority for its existence and action, and the foundation for all the subsequent proceedings, is the logical starting point of the record, which should therefore properly be prefaced by a copy of the same. Par. 1037 of the Regulations directs that the record "will set out a copy" in each case. It is not *necessary* indeed that it be prefixed, since it may be appended at the end; the best, however, and now uniform practice is to prefix it. In addition to specifying the detail of members, time and place of assembling, &c., it should show, by its heading and subscription, by what commander,—whether Commander-in-chief (President,) General of the Army, commander of a separate army, department, division, separate brigade, regiment, garrison, &c.,—it has been issued, thus testing at the outset the legality of the entire proceedings.

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[1] Compare 8 Opins. At. Gen., 336, 340.

[2] Par. 1038 prescribes—"The record shall be clearly and legibly written, as far as practicable, without erasures or interlineations." Imperfect legibility is noticed as a defect in G. O. 23, Army of the Potomac, 1863; Do. 3, Dept. of the Pacific, 1863; G. C. M. O. 5, 6, Dept. of Mo., 1875. Erasures and interlineations occurring in records are animadverted upon in the two first of these G. O.; also in Do. 76, Dept. of the Gulf, 1863.

Though the regulation contemplates that the record will be written, there is no *legal* objection to *type-writing* or otherwise *printing* it in whole or in part, except of course the signatures of the president and judge advocate. Such printing, however, generally necessitates frequent corrections, and has not been found to be a very material improvement upon the written form. In Circular, No. 12, Hdqrs. of Army, of 1883, "the use of a 'type-writer' in writing out *sentences* of courts-martial is disapproved." And see G. C. M. O. 27, Dept. of the Colorado, 1893.

If, as is the more usual course, a series of cases are brought to trial before the court, a separate copy of the convening Order is to be prefixed to the record of each case. Merely to prefix a copy to the record of the first case tried is to render each record after the first incomplete, thus disregarding the above-stated general rule—that each record should be complete and perfect of itself.

Where, subsequently to the issue of the original Order, there are issued supplementary Orders relieving or adding members, detailing a new judge advocate, changing the place or time of session, or otherwise modifying the first Order, copies of all such Orders should in general be prefixed, in the proper succession, to each record made up after their dates, not only as belonging to the history of the proceedings, but as indicating perhaps the authority for the appearing and acting of a member or members or the judge advocate, which otherwise would not be exhibited on the face of the record.[1] In this class of Orders are included those in the form of telegrams:[2] copies of these, where affecting the *personnel* of the court, &c., should be prefixed until Orders of a more formal character be substituted therefor. Where, after arraignment, or pending a session of the court, a new Order or telegram of the class under consideration is communicated to the court, the same should properly be entered in the body of the proceedings, at the point at which it was received, and prefixed to the subsequent records of trials by the same court. Where an Order ceases to have force,—as where it is wholly superseded by a subsequent Order,—it may be omitted from further records. If any considerable number of Orders modifying the original detail, &c., have been issued, and are properly required to be prefixed to each record, it may be found convenient to have them *printed*.

Statement of original assembling of the court. The record of the actual proceedings of the court begins with a statement of the first assembling of members at the proper place and time in accordance with the terms of the convening Order. If the full detail makes its appearance, a statement in the record that *all the members were present* will be legally sufficient: the preferable form, however, is to specify the several members by name, in the order of their rank, with their official designations. A statement to the effect that *the same members* were present as at a previous trial by the same court is irregular and insufficient, as contravening the fundamental rule that the proceedings of each case should be complete *in se* and not required to be supplemented from the record of any other case.[1]

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[1] In G. O. 3 and 7, Dept. of the Mo., 1863, the proceedings were disapproved as incomplete on account of the omission of copies of such Orders.

[2] See G. O. 3, Dept. of the Mo., 1863.

If some of the members detailed are absent, the record should state by name who are present and who are absent, with the cause of absence in each case, if known;[2] if not known, an entry of—"cause of absence unknown," or words to that effect, should be added.[3] If less than five are present, it is usual and proper to add a statement that—"no quorum being present, the members thereupon adjourned."

The presence of the judge advocate and of the accused, if present in fact, should also be specified. If absent, the cause of absence should be stated when known. If an adjournment is taken on account of the absence of either, it should be so noted. If the judge advocate is not present at the first assembling, the senior member will properly retain a memorandum of the same, to be furnished the judge advocate for incorporation into the formal record.

At this, or at a later, stage, the record should show that the accused had an opportunity to introduce counsel, and should give the name of the counsel if any be introduced.

Statement of subsequent assemblings. The statement of the assembling of the court on the second and subsequent days[1] of a trial should be headed with the proper place and date[2] and should recite that the court met pursuant to adjournment, naming the members present as in the record of the original session. To state—where such is the fact—that "the same members were present as yesterday," or "as at the last session," is a form sometimes adopted,[3] but it is always better to specify the actual members present on each day though they may be always the same.[4] Their rank should of course be given, but a variance in the designation of the rank of a member in any day's proceedings from the designation of the same in the convening Order occasioned by the promotion or new appointment meanwhile of the member, will not affect the validity of the proceedings, the member being otherwise sufficiently identified.[5] Where, however, a member has been so promoted, &c., the fact should properly be noted in the proceedings of the day on which he first takes his seat with his new rank. Other changes in the *personnel* of the members, as the relieving of old members or detailing of new ones; should be entered in the record of the session at which the same are officially communicated to the court.

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[1] So, statements simply to the effect that "the Court being in session," after a certain completed trial, "proceeded to the trial of," &c.; or that "the Court met pursuant to adjournment," from a previous trial—without adding who were present, are faulty as not showing, without a reference to some other distinct proceeding, what and how many members attended at the particular trial. See G. O. 292 of 1863; Do. 64, Dept. of Ark., 1865; Do. 120, Dept. of the Mo., 1867; Do. 51, Dept. of the Platte, 1871.

[2] Circ. No. 5, (H. A.,) 1891.

[3] See G. O. 3, 14, Dept. of the Mo., 1862; Do. 4, Dept. of N. Mexico, 1864; Do. 97, Dept. of Dakota, 1871; G. C. M. O. 54, Dept. of the Platte, 1876.

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[1] It is not unusual to head the proceedings of the successive days of a trial—"First Day"—"Second Day," &c. So, the records of cases successively tried by the same court are sometimes endorsed as—"First Case"—"Second Case," &c.

[2] "In every case the particular *date* of the first and each subsequent meeting should be stated in the record." G. C. M. O. 54, Dept. of the Platte, 1875, (Gen. Crook.)

[3] Where *all* are present, it is indeed sufficient to state—"Present all the members of the Court, and the Judge Advocate." Circ. No. 5, (H. A.,) 1891.

[4] See G. O. 3, Dept. of the Pacific, 1863; Do. 5, Dept. of La., 1868. In G. O. 37, Middle Mil. Dept., 1865, Gen. Hancock comments on an exceptional record as follows:—"Upon one day 'all' are recorded as present; upon another 'all but one;' upon another 'all but two;' no one is individualized, and the presumption is that certain members absent one day when testimony was received were permitted to act and take part in the deliberations of the court on subsequent days. This is inexcusable negligence." Upon each day's record, all members of the court, both present and absent, should be duly accounted for. G. C. M. O. 96, 99, 100, Dept. of the Platte, 1886. In Circ. No. 5, (H. A.,) 1891, it is added—"When the absence of an officer who has not qualified, or who has been relieved or excused as a member, has been accounted for, no further note will be made of it."

[5] See G. O. 40, Dept. of Ark., 1864.

The presence of the judge advocate,[1] and of the accused, (with that of the counsel, if any,) should also be particularized. Where a new judge advocate has been detailed, this fact and that of his attendance should be specified. On all days and occasions of the trial on which any material proceeding is had or business is done, the accused,—unless he has wilfully absented himself, as by escaping from military custody or deserting the service, or has been obliged to be removed on account of drunkenness or disorderly conduct,[2]—is entitled to be present and his presence is essential to the legality of the proceedings and sentence.[3] When present, therefore, the fact of his presence should be affirmatively stated at the commencement of the record of the day's session, and not left to presumption.[4] If absent, his absence should be similarly accounted for.

If on the second or subsequent day, a quorum does not attend, or the judge advocate or accused is prevented by sickness or otherwise from being present, the record will properly specify who is absent, and will in general add that the members present adjourned on account of such absence. Members who first appear on a day subsequent to that of the original assembling will properly render some explanation of their previous absence, which will be entered in the proceedings for the information of the reviewing authority,[5] and if sickness has been the cause a medical certificate will properly be furnished:[6] under similar circumstances, a similar excuse should be offered by the judge advocate, and recorded. Unless the court has been authorized, by the convening of a subsequent Order, to "*sit without regard to*

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[1] The presence of this official should not be left to be inferred from the fact stated of his being sworn, or of his putting questions to the witnesses, but should be specifically declared. G. C. M. O. 45, Dept. of Texas, 1874.

[2] See Prendergast, 208.

[3] G. O. 185, Dept. of the Ohio, 1863; Do. 81, Northern Dept., 1864; Do. 65, Dept. of Ark., 1865; DIGEST, 642; Simmons § 470; Clode, M. L., 139. And compare Long *v.* State, 52 Miss., 23; Graham *v.* State, 40 Ala., 659; Witt *v.* State, 5 Cold., 11.

[4] See authorities cited in last note.

[5] See G. O. 4, Dept. of N. Mexico, 1864; Do. 106, Dept. of Dakota, 1871.

[6] If a member be detained from the court by illness, he will properly, if practicable, forward such a certificate to the president of the court. See G. C. M. O. 96, Dept. of the Platte, 1886.

hours," the record will properly state the hour of assembling as well as of adjournment on each day, so that it may appear that Art. 94 has been complied with: such statement, however, is not an *essential*, since, in the absence of evidence to the contrary, it will be *presumed* that that the legal hours were observed.

Where *adjournments* are taken or *continuances* granted, their periods should be specified, and it should appear from the record that the court reassembled on the day thus fixed.[1] A statement of an adjournment to the next or a succeeding day should be noted at the end of each day's session. Where a continuance is formally applied for under Art. 97, the written application, (see par. 1013, A. R.,) should be appended (or incorporated) and properly referred to; and if an issue is made upon the application, the particulars should be fully stated.

Further the record of each day's session, after the first, will—if such was the fact—properly state at the opening, (though this is not an essential,) that the proceedings of the previous day's session were read and approved; any corrections made upon such reading being specifically noted.

Statement as to Challenges. Art. 88 entitles the accused to challenge the members separately "for cause stated to the court." Par. 1037 of the Army Regulations directs that—"the record must show" that the accused "was asked if he wished to object to any member and his answer to such question."[2] It should thus appear from the record that the Order or Orders convening the court and detailing the members present were read to the accused or communicated to him and that he was afforded a full opportunity of challenge. If he responds that he has no objection to any member, the record should so state. If in answer he presents any specific objection or objections, the same, whether oral or in writing, should be given as made, and the proceedings thereupon had as to each member objected to, (as already indicated in Chapter XIV,) including the personal declaration, if any be made, of the member, and if issue be joined on the challenge, the argument or remarks of the judge advocate and of the accused or his counsel, with the evidence adduced if any, and finally the decision of the court in each case,—should be fully set forth. If a member be added to the court, subsequently to the organization, the record should similarly show that the opportunity to object to such member was formally afforded the accused, with the proceedings had in case of challenge.

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[1] In a case in G. O. 180, Fifth Mil. Dist., 1869, one of the grounds upon which the sentence was disapproved was that the court on one occasion reassembled on a day different from that to which it had specifically adjourned on a previous day. And see, to a similar effect, G. O. 5, Dept. of La., 1868.

[2] When a challenge interposed by the accused has been acted upon, the record will properly show that he was asked whether he had any "further" objections to the members, and his answer. See G. C. M. O. 67, Dept. of Dakota, 1882.

The absence of an express declaration in the record to the effect that the accused was afforded an opportunity of challenge has, in some instances, been held fatal to the validity of the sentence ; in others, has been treated as ground merely for the disapproval of the proceedings. In the opinion of the author, such omission, though certainly a serious irregularity, does not—being an omission to comply not with a positive statute but with a directory regulation only—amount to a fatal defect.[1] Of course, if it is the *fact* that an accused was not afforded an opportunity of challenge, such fact, when ascertained, would constitute good ground for disapproval of the proceedings or sentence, or for a remission of the sentence if already approved.

If, after opportunity for challenge has been duly afforded the accused, the judge advocate should object to a member or members on the part of the prosecution, record will be similarly made of such objection and of the proceedings thereupon had.

Statement as to the qualifying of the members and judge advocate, and organization for trial. Par. 1037, Army Regulations, directs that the record shall "show that the court and judge advocate were duly sworn in the presence of the prisoner." The record should therefore so state, and a statement to this effect is sufficient without any recital of or reference to the form of the oath as prescribed by Arts. 84 and 85. The statement is to be made in each separate record, since the court and judge advocate are required to be sworn anew for each case tried.[2] If an absent member is admitted, or a new member added, or new judge advocate detailed after the original swearing of the court and judge advocate, the record should similarly show that such member or judge advocate, before acting, was properly separately sworn.[1]

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[1] In 3 Opins. At. Gen., 397, the opinion is expressed by Attorney General Grundy that "its not appearing on the record that the prisoner was asked if he had any objection to the members of the court would not be sufficient cause for setting aside the proceedings."

[2] G. O. 60 of 1873. Compare Coffin *v.* Wilbour, 7 Pick., 150.

The form of statement as to the administering of the oaths, most commonly adopted, is substantially that proposed by Judge Advocate General Holt, as follows: "*The members of the court were then severally duly sworn by the judge advocate, and the judge advocate was then duly sworn by the president of the court; all of which oaths were administered in the presence of the accused.*" This is a suitable form for inferior equally as for general courts. Where several persons are to be jointly arraigned and tried, the record should specify that the oaths were administered in the presence of *all* the accused.

But while the above form is to be recommended, any statement will properly be deemed sufficient from which it can be ascertained or fairly presumed by the reviewing authority that the members and judge advocate were in fact qualified as required by the Articles of war prior to the arraignment. The omission of the term "duly," or of the words "in the presence of the accused," has in some cases been held to vitiate the proceedings and sentence, in others has been treated as ground merely for the disapproval of the same. In the opinion of the author, neither of these terms is *essential*. But to omit either would be to reject a form established by regulation and usage, and would induce an uncertain and unsafe mode of statement of a material and important particular.

It is upon the due and formal swearing of a quorum of members that the court is, properly speaking, *organized* for the particular trial.[2] After setting forth, therefore, the qualifying of the members and judge advocate, the record may well add a statement to the effect that—*The court being duly organized then proceeded to the trial of the accused*, (naming him,) *upon the following charges and specifications.*

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[1] See G. O. 68 of 1863; G. C. M. O. 259 of 1865; G. O. 46, Dept. of the East, 1864; Do. 41, Dept. of Ark., 1864; Do. 5, Fourth Mil. Dist., 1868; G. C. M. O. 6, Dept. of Miss., 1865; G. O. 42, Dept. of the Tenn., 1863.

[2] Par. 1037, Army Regs., directs:—"The record must show that the court was organized as the law requires." That is to say, that at least five members, accepted by the parties or held competent on challenge, were duly sworn for the trial.

Statement of charges, arraignment and pleas. The charges and specifications—originals or copies—including "additional" charges, if any, should then follow or be specifically referred to as annexed to the proceedings. The preferable form, and that almost invariably practiced, is to insert them in the body of the record at this point. Where—as is more usual—a copy is given, the name of the officer by whom the originals were signed should appear at the foot. This is not indeed essential, but as a material part of the history of the prosecution, should not be omitted in a case of any importance. If a copy be thus incorporated, the originals need not be appended.

The record will then proceed to state the fact of the arraignment of the accused upon the charges and specifications, and his pleas of Guilty or Not Guilty to the same respectively. Where the plea is identical to all, it may be recited that—"to all of which charges," &c., the accused pleaded "Guilty" or "Not Guilty," or in terms to such effect. The approved form of statement, however, is to enter the pleas separately as made to each several charge or specification in its order.

If a special plea is interposed at this stage,—as a plea to the jurisdiction, or a plea of the statute of limitations, of pardon, or of former trial,—the same should be specified with the grounds upon which it is based. If expressed in writing, the written plea will properly be incorporated in the record, or referred to as annexed. The issue, if any, raised upon the plea, with the evidence, if any,[1] argument, and ruling of the court, will follow. If the plea be sustained, and the same has covered all the charges, the record will terminate with a statement of adjournment. If it be overruled, the next statement will regularly be that the accused was then called upon to plead to the merits, and pleaded accordingly, with a recital of the pleas as made. Should a *motion*—as a motion to strike out—be made at this point, the proceedings will be similarly set forth. If, upon arraignment, the accused *stand mute*, this fact, with the action thereupon taken as required by Art. 89, should be particularized.

Statement of the testimony. The record must set forth fully and independently the testimony of each witness,[2] specifying by which side—prosecution or defence—he is introduced, and that he is first duly sworn or affirmed as the case may be.

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[1] See 3 Opins. At. Gen., 545.

[2] A mere reference to the testimony of such witness, as taken in a

The testimony should be given, not in mass, but in the form of separate answers to specific questions.[1] The answers as recorded should be as nearly as practicable in the exact words of the witness, no matter how indefinite, disconnected, ungrammatical or inelegant the same may be.[2] If the answers as rendered are liable to be misunderstood, the accused should be called upon in further questions to explain the obscure portions.[3] For the judge advocate to assume to translate the testimony into what he considers elegant or correct English, or to substitute his own language for that of the witness, or to record only such testimony as he may deem material, or to abbreviate or summarize the testimony,—would constitute not merely a serious dereliction of duty on his part, but a very grave irregularity on the part of the court permitting it.[4] Another grave irregularity would be to introduce into the record as evidence any oral statement other than the sworn testimony of witnesses present in court—as a statement of, or reference to, anything said or done, by the accused or other person, *out of court.*[5]

Where any considerable amount of testimony has been given by a witness, especially where it has been taken down in short-

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similar case previously tried by the same court, is of course wholly insufficient. See G. O. 2, Dept. of the Pacific, 1863; Do. 29, Dept. of the Platte, 1869. (Remarks of Gen. Augur.)

[1] G. O. 77, Dept. of the East, 1870. In G. O. 11, Dept. of the Platte, 1868, it was noticed as a serious irregularity that in the proceedings in several cases there was "an omission to record the questions propounded." Similarly in G. O. 8, First Mil. Dist., 1868.

[2] Hough, (A.) 79, writes—"But to record at all times barrack phraseology is not expected." And Coppée, (p. 74,)—"In case the witness is a foreigner, his idiomatic mistakes may be corrected in the record." But the only safe and accurate mode is to record the testimony *precisely as given*, calling upon the witness afterward to explain it, if necessary, or elucidating it by other evidence.

[3] See last note.

[4] An irregularity of this class, which has properly been pointedly condemned in several cases, is the omission to record in whole or in part the testimony of a witness on the ground that such testimony is merely *corroborative* of that of a previous witness. In a case in G. O. 192, Dept. of the Ohio, 1863, the proceedings were disapproved on account of such an omission. And see Griffiths, 109.

[5] See G. C. M. O. 41, Div. Atlantic, 1886.

hand, the record should show that it was read over to the witness, opportunity being afforded him to make corrections, and pronounced by him to be correctly recorded.

Where a deposition, or other written or documentary evidence, whether original or copy, is introduced, the same will in general preferably be marked and attached to the record as an exhibit, proper reference being made thereto in the body of the proceedings.[1] A brief writing, however—as a simple post or field Order, short letter, &c.—may well be copied into the record of the day's session, the original, if such be introduced, being annexed at the end and so indicated.

Wherever the admission of evidence is objected to, the nature of the objection should be stated, with the discussion, if any, had, and the ruling of the court upon the issue. The character of evidence which is ruled out should appear as fully as that of evidence which is admitted.[2] A clearing of the court for deliberation upon an objection to testimony, with the subsequent reopening, should be specifically noted.[3]

It is naturally in the admission and exclusion of evidence that a court-martial should be most frequently led into error; and, upon extended trials, the proceedings are not unfrequently encumbered with a mass of matter, admitted especially on behalf of the accused, from which a careful consideration of the rules of evidence would have relieved the record without prejudicing defence or prosecution.[1]

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[1] As to the making up of Exhibits with the record, see par. 1038 Army Regs.; also G. C. M. O. 80 of 1875, which directs as follows:—"All papers received in evidence, and other exhibits, should be securely attached to the record, but in such a way that they can be freely read, in the order in which they are received, and distinctly numbered so as to facilitate reference to them." Failure to attach writings introduced in evidence has been frequently remarked upon in Gen. Orders. The omission seems to have more frequently occurred where the writing was an extract from a book—as a Morning Report Book, Clothing Book, &c. In such cases, an abstract of so much as relates to the offence charged, and is actually put in evidence, should be entered in the body of the record or attached as an Exhibit. G. O. 63, Dept. of the East, 1864; G. C. M. O. 49, Dept. of the Mo., 1875. The rule applies equally to writings introduced in proof of good character —as testimonials, honorable discharges, &c. Copies of such should properly be appended at the end of the record. G. C. M. O. 1, Dept. of the Platte, 1880; Do. 64, Div. of Pacific & Dept. of Cal., 1881.

[2] See Lieut. Col. Fremont's Trial, p. 240. The court has of course no power to *expunge* as inadmissible or improper any evidence duly recorded. Capt. Barron's Trial, p. 47.

[3] And so of the clearing and reopening wherever deliberation is had upon any interlocutory question whatever.

It is usual and convenient to specify in the record the fact of the closing of the testimony on the part of the prosecution, and its opening on the part of the defence.

Where no evidence is introduced by the accused, it should appear that he was afforded an opportunity to make a defence by being called upon to offer testimony, and that he declined to do so. Where also the accused or the judge advocate declines to cross-examine a witness examined in chief by the other, this fact will properly be noted.[2]

Where the accused himself takes the stand, his testimony should be taken and recorded as fully, and in the same manner and form, as that of any other witness, and it should properly be stated in the record, in view of the provision of the Act of March 16, 1878, c. 37, that he is introduced as a witness for the defence *at his own request.*[3]

If a witness is examined through an *interpreter*, the record should state the occasion therefor—as that the witness is a foreigner who does not speak English or speaks it but imperfectly, specifying also the fact of the swearing of the interpreter.[4]

Statement as to closing arguments or addresses. The record will, in general, next set forth the written or verbal state-

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[1] "The 171 pages of record in this case are replete with errors. The ruling out of legitimate testimony and the ruling in of matter wholly irrelevant occurs again and again. The court seems to have lost sight at times of the specific charges committed to it for investigation; the consequence is a record overburdened with many pages of matter foreign to the case. The latitude of investigation and comment by the defense permitted by the court is deemed to exceed anything justified by the custom of the service or the demands of justice. For these and other reasons not necessary to enumerate, the proceedings, findings and sentence are disapproved." G. C. M. O. 78, Dept. of Dakota, 1892. (Gen. Merritt.)

[2] G. O. 18, 31, Dept. of Cal., 1872.

[3] G. C. M. O. 13, Dept. of Texas, 1882; Do. 3 Id., 1886; Do. 41, Div. Atlantic, 1886.

[4] A form of oath to be administered to an interpreter is given in Circ. No. 12, (H. A.,) 1893. The proper statement in the record would be that he was *duly sworn to truly interpret in the case now in hearing.*

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Dept. of the Columbia, 1880.
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be no material variance in the name of the accused between the sentence and the specifications.[1]

Except in the single instance of a death sentence, where, in view of the terms of Art. 96, it may be, and in practice is, added in the sentence that two-thirds of the members concurred therein, no reference whatever to the vote of the members by which the finding or sentence was determined upon is to be made in the record. A statement that the finding or sentence was "unanimous" would be a gross, and now most exceptional, irregularity. Where the vote on a charge or specification is a tie, this fact of course is not to be stated, but an entry simply of Not Guilty is to be recorded.[2]

As has already been noticed, the findings and sentence must be entered in the handwriting of the judge advocate as the official recorder. They cannot properly be printed with a typewriter.[3]

It need hardly be added that nothing in the nature of a *protest*, by a member or members, against a finding or the sentence or any action of the court, can properly be entered upon or attached to the proceedings.[4]

Statement of previous convictions. Where, in the case of an enlisted man, there has been a conviction of an offence "admitting of the introduction of previous convictions," the fact of the opening of the court "for the purpose of ascertaining whether there is such evidence, and, if so, of hearing it,"[5] should clearly appear from the record, and the presence of the accused and the judge advocate should be noted. If such evidence be introduced, the records of trial, or orders of promulgation presented, should be appended as exhibits with the proper reference thereto in the body of this part of the proceedings. If the evidence is excepted to by the accused, the nature of the objection and particulars of the issue should be fully stated. At the end of this stage, the re-closing of the court—the judge advocate and accused withdrawing—should be duly minuted.

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[1] G. O. 6, Dept. of La., 1868; G. C. M. O. 45, Dept. of Texas, 1874; DIGEST, 645.

[2] G. C. M. O. 17 of 1871; Do. 1 of 1872.

[3] Circ. No. 12, (H. A.,) 1883; G. C. M. O. 11, Dept. of the Columbia, 1892; Do. 27, Dept. of the Colorado, 1893.

[4] See Chapter XIX—"Protest."

[5] G. O. 64 of 1892, set forth in Chapter XIX—"Receiving of evidence of Previous Convictions."

Authentication of the record. It is directed by par. 1037, Army Regulations, that—"The record will be authenticated by the signatures of the president and judge advocate in each case;" and the mere affixing, at the conclusion, of these signatures will be a sufficient authentication. More artificially, the record is well authenticated by adding to the same, at the end of the final proceedings had, some such form as—*A true and complete record. Attest:* A. B., *President;* C. D., *Judge Advocate.*[1] Where the president or judge advocate has been changed pending the trial, it is of course the one officiating at the time of the authentication who is to subscribe the same.[2] The authentication should, regularly, be executed in the presence of the court before the final adjournment, and as a part of the proceedings.

Where the proceedings have been formally duly authenticated, and the record is subsequently returned for correction, and additional proceedings are thereupon had, it will be regular and proper to repeat the form of authentication at the end of such additional proceedings.[3]

Statement of final adjournment. It has been not unusual to add a statement of this character at the end of the record, but the same is not required by law or regulation, and is quite unnecessary. The formal *authentication* of the record is the legal and proper final proceeding of the court.

The recommendation. This, as indicated in Chapter XX, is no part of the legal record. When made, however, it is usually entered upon a blank page after the final authentication or upon an appended paper. The body of it may be written by one of the signing members, or by the judge advocate or a clerk at the members' dictation.

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[1] A similar form has been adopted in the Dept. of California. See Circular of that Dept., of May 20, 1885. A statement of a final *adjournment*, signed by these two officers, has sometimes been employed as a form of authentication, but is clearly not properly such. That such statement is itself without legal significance in the record, see *post.*

[2] See DIGEST, 645; G. C. M. O. 22, Dept. of the Columbia, 1880.

[3] See G. O. 7, Dept. of the South, 1869.

Statement of proceedings upon revision. Where, as he is authorized to do, the reviewing authority returns the record to the court for the correction of error, the proceedings thereupon had should, as indicated in Chapter XXI, constitute a separate record in themselves, which, though properly attached at the end of the original record, should be quite independent of and distinct from the same. This, (which may well be headed—*Proceedings on Revision*,) will regularly recite that the court assembled at a certain time and place,—certain members named, and constituting a quorum of those who took part in the trial, being present,—in pursuance of the following Order or communication, or in terms to such effect. The Order directing the reassembling of the court, and indicating the reason therefor, with accompanying papers if any, will then be inserted or referred to as appended.

The action taken by the court in making the correction, or otherwise, will follow, and the whole supplementary record be authenticated by the signatures of the president and judge advocate. As set forth in Chapter XXI, the conclusion and action of the court in making and declaring the correction must wholly appear in the separate record of the revision. The portion of the original record to which the correction applies will be designated of course by the proper reference, but such portion is to be left as it stands, without erasure, interlineation, rewriting, note, or any other addition or modification whatever.[1]

Statement of action of reviewing authority. This, while no part of the record of the court, completes the history of the case tried, and is accordingly, as a general rule, written in or upon the record after the last proceeding of the court—most properly after the formal authentication. The Army Regulations (par. 1041) indeed direct in regard to it that the confirming authority—"shall state at the end of the proceedings in each case his decision and orders thereon." A similar rule properly applies to records of cases which fail of being regularly completed by trial, being disposed of upon an interlocutory issue.

The statement consists usually, as has already been indicated,[2] of an announcement, headed by a designation of the place, (headquarters of the command,) and date, and signed by the reviewing officer in his official capacity, to the effect that the proceedings, findings and sentence are approved, or disapproved, in whole or in part, as the case may be, with such modification of the sentence by remission, commutation, or mitigation, if any, as may be deemed just and proper. Such directions, in regard to the manner and form of executing the sentence or a punishment as may be necessary, are added; and if the punishment adjudged is a reprimand, to be administered by the reviewing officer, it is administered in terms accordingly. The approval, disapproval, &c., may be stated without reasons or remarks, or may be accompanied by such comments or animadversions upon the facts of the case, proceedings of the court, &c., as may be deemed to be called for.

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[1] See Chapter XXI—"Return of the Proceedings for correction."

[2] Chapter XXI—"Formulating of action."

Where the sentence adjudged is one requiring, for its execution, the confirmation of the President, (or other superior authority,) under Art. 106, &c., or where the execution of the sentence is suspended under Art. 111, the action will in general consist simply of an approval of the proceedings and sentence, and a declaration that the proceedings are forwarded, (the execution of the sentence being stated—where such is the fact—to be suspended,) for the action of the President, &c. The record having reached the latter, his action, confirming, disapproving, remitting, commuting, or mitigating the sentence, with remarks if any, is written upon the record under or after that of the original reviewing authority, and the formal action is complete.

It is to be added that the action taken should be written in or upon each and every separate case tried by the court, though it may be identical in each; and further that to append to a record a copy of the written or printed Order promulgating the proceedings, *in lieu* of a written approval or other action over the signature of the reviewing officer, is irregular and insufficient, since this would be a substitution of a copy for the original. A copy indeed of such Order should accompany the record when "forwarded to the Judge Advocate General" for file in his office.[1]

Endorsement of the record. This, which is placed upon the record before the transmittal of the proceedings to the reviewing authority and his action thereon, should properly be in the form prescribed in par. 1039 of the Regulations.

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[1] Par. 985, A. R.

Effect of Loss or Destruction of Record of Trial. Where, by casualty of war, accident, or otherwise, a record, duly completed and finally acted upon by the reviewing authority, has been lost or destroyed, the judgment of the court is not thereby affected, and the sentence, if any, may legally be executed as in any other case. If the record be lost *before* the proceedings have been completed or been acted upon, they are necessarily vacated unless the record can be made up again from reports or notes in the possession of the judge advocate or reporter, or a member.[1] In such a case indeed, the trial may be had *de novo*, unless,—an acquittal or conviction having been reached on the original hearing,—the accused interposes a plea of "former trial." It will always be a prudent course for the judge advocate, in forwarding the formal record, to retain for a reasonable time his original draft or notes of the proceedings, for use or reference in case of accident. In a recent case in the Department of Texas, it is observed by Gen. Wheaton, as follows—"The original record of proceedings in this case was lost in transit through the mails. Fortunately, the judge advocate retained his original notes and was thus enabled to furnish the court with another copy. The action of the judge advocate, * * * in keeping his notes until the publication of the general court-martial order in this case, is an exercise of due care and a commendable action."

Presumption of Law as to Regularity of Proceedings stated in Records—*Defects of form not material.* Where it appears on the face of a record of court-martial that the court was legally constituted and composed and had jurisdiction of the case tried, reasonable presumption will be made by the law in favor of the sufficiency of the proceedings, which, provided that no mandatory statutory requirement has been disregarded, will in general, irregular though they may be in form, properly be held to be regular in substance and legal in fact.[2] As to any action indeed provided by *statute* to be taken by the court, the record should clearly indicate that such provision has been complied with, but that it does so in bald and imperfect terms will not in general affect the validity of the proceedings or judgment, since the law will presume that what is stated to have been done was *duly* done. And the presumption will be stronger as to a particular called for by a directory regulation or by usage only. Thus where—as more frequently occurs in the hurry of time of war—the statements and recitals of a record of a legal court-martial are incomplete or otherwise defective, it will not necessarily result that the validity of the sentence adjudged is to be held to be fatally affected. If only the acts and functions *required* of the court by the Articles of war or other *statute* are found to have been substantially observed and performed, the law will in general presume that the details of the proceedings were due and sufficient, and a failure of justice thus be obviated.

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[1] See Simmons § 743–4; Gorham, 69; also Rules of Procedure, 94, 98.

[2] As to this presumption of "*omnia rite acta*," in civil cases, see Slade *v.* Minor, 2 Cranch C., 139; Hutton *v.* Blaine, 2 S. & R., 75, 79; Moore *v.* Houston, 3 Id., 197; Trinity Church *v.* Higgins, 4 Robt., 1; Edwards *v.* State, 47 Miss. 581. As to military cases, see Rex. *v.* Suddis, 1 East, 315; Porret's Case, Perry, 419; DIGEST, 648–9, note; Chapter V, p. 55, *ante*.

Thus, if a record, in the statement of the swearing of the court, &c., omits to specify that it, (or the judge advocate,) was sworn "in the presence of the accused," as it is directed by the Army Regulations that the record shall "show," and merely states that it was "duly sworn" or simply "sworn," the legal validity of the proceedings will not, in the author's opinion, be affected, but it will be presumed that the swearing was according to law and sufficient. Otherwise,[1] however, where there is an entire absence of statement as to the fact of swearing; since the *statute*—Arts. 84 and 85—certainly contemplates that the court and judge advocate shall be qualified by a formal oath.[2]

Defects, though occurring in material parts of the proceedings, if amounting, when taken into consideration with the entire record, to defects of *form* merely, will properly be regarded as only irregularities, not affecting the legal validity of the recorded proceedings. In a leading case on this subject before a U. S. Circuit Court, where the record failed to show any arraignment or plea, but the issue of guilt was fully made before the jury and a fair trial had, such defect was held, under the circumstances of the case, to be one of *form* merely, not entitling the accused to a new trial.[1]

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[1] Thus it has been held in civil cases that, where the record simply showed that the jury had been *sworn*, it was to be *presumed* that the swearing was in legal form, or "according to law." Edwards *v.* State, *ante;* Dyson *v.* State, 26 Miss., 362; Trinity Church *v.* Higgins, 4 Robt.; 1 Hough, (P.,) 759.

[2] Here the maxim of the law will apply, that what does not appear at all will be considered as not having existed or been done. See 3 Opins. At. Gen., 396. That an absence from the record of any statement or indication that the court or judge advocate has been sworn at all, will invalidate the sentence, unless the omission can be supplied upon the revision, has been repeatedly held. 3 Opins. At. Gen., 396, 544; G. O. 32 of 1863; G. C. M. O. 21, Dept. of the Columbia, 1880.

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[1] U. S. *v.* Molloy, 31 Fed., 20. And see Sec. 1025, Rev. Sts.

CHAPTER XXIV.

COURTS OF INQUIRY.

THE subject of this Chapter will be considered under the following heads:—I. The Law relating to the Court of Inquiry; II. Its Nature, in general; III. Its Constitution; IV. Its Composition; V. Its Function; VI. The Recorder; VII. Procedure; VIII. Action on the Proceedings; IX. The Proceedings as Evidence.

I. THE LAW ON THE SUBJECT.

Articles of War. The law relating to Courts of Inquiry—as derived with but slight modification from the provisions of the Articles of 1786[1]—is almost entirely contained in the seven Articles of the existing code, from the 115th to the 121st, as follows:

"ART. 115. *A court of inquiry, to examine into the nature of any transaction of, or accusation or imputation against, any officer or soldier, may be ordered by the President or by any commanding officer; but, as courts of inquiry may be perverted to dishonorable purposes, and may be employed, in the hands of weak and envious commandants, as engines for the destruction of military merit, they shall never be ordered by any commanding officer, except upon a demand by the officer or soldier whose conduct is to be inquired of.*

"ART. 116. *A court of inquiry shall consist of one or more officers, not exceeding three, and a recorder, to reduce the proceedings and evidence to writing.*

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[1] Prior to this date, Courts of Inquiry in the army were sometimes ordered by Commanders under their general authority as such, and on a few occasions were directed to be convened by Resolutions of Congress. See, for example, the case of the Inquiry directed by Congress to be ordered by General Washington into the conduct of officers "in the Canada Department" and other instances, in 1 Jour. Cong., 384, 427–8; 4 Do., 625.

"ART. 117. *The recorder of a court of inquiry shall administer to the members the following oath: 'You shall well and truly examine and inquire, according to the evidence, into the matter now before you, without partiality, favor, affection, prejudice, or hope of reward: so help you God.' After which the president of the court shall administer to the recorder the following oath: 'You, A. B., do swear that you will, according to your best abilities, accurately and impartially record the proceedings of the court and the evidence to be given in the case in hearing: so help you God.'*

"ART. 118. *A court of inquiry, and the recorder thereof, shall have the same power to summon and examine witnesses as is given to courts-martial and the judge advocates thereof. Such witnesses shall take the same oath which is taken by witnesses before courts-martial, and the party accused shall be permitted to examine and cross-examine them, so as fully to investigate the circumstances in question.*

"ART. 119. *A court of inquiry shall not give an opinion on the merits of the case inquired of unless specially ordered to do so.*

"ART. 120. *The proceedings of a court of inquiry must be authenticated by the signatures of the recorder and the president thereof, and delivered to the commanding officer.*

"ART. 121. *The proceedings of a court of inquiry may be admitted as evidence by a court-martial, in cases not capital, nor extending to the dismissal of an officer:* provided, *that the circumstances are such that oral testimony cannot be obtained.*"

Other Statutes. The Act of March 16, 1878, c. 37, which enables "the person charged" to testify as a witness before "courts-martial and courts of inquiry," is the only existing statute, (other than the Articles of war,) relating in terms to these courts. The provision of Sec. 1203, Rev. Sts., empowering "the judge advocate of a *military court*" to "appoint a reporter who shall record the proceedings of and testimony taken before such court," though not in terms applying to cases before courts of inquiry, has, in practice, been viewed as authorizing recorders of such courts to make such appoinment. Sec. 1202, Rev. Sts., by which "every judge advocate of *a court-martial*" is empowered to issue process to compel the attendance of witnesses, applies in its terms still less than Sec. 1203 to recorders of courts of inquiry, and cannot, in the opinion of the author, legally be extended to the latter.[1] A statute authorizing a restraint of the liberty of the citizen is to be strictly construed.

The British Law. The law in regard to the British court of inquiry—a body of inferior scope and powers as compared with the same court under our code—is mainly contained in the 123d of the Rules of Procedure.[2]

II. THE NATURE OF THE COURT.

As Distinguished from a Court-Martial. The court of inquiry, so called, is really not a court at all. No criminal issue is formed before it, it arraigns no prisoner, receives no plea, makes no finding of guilt or innocence, awards no punishment. Its proceedings are not a trial, nor is its opinion, (when it expresses one,) a judgment. It does not administer justice, and is not sworn to do so, but simply to "examine and inquire." [3] It is thus not a Court but rather a Board[4]—a board of investigation with the incidental authority, (when expressly conferred upon it,) of pronouncing a conclusion upon the facts. But, as it is a sworn body, and as the witnesses before it are sworn and examined and cross-examined as before courts-martial, it is a Board of a higher sort in the nature of a court, and has thus come to be termed a court in the law military.

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[1] The original statute,—a provision of the Act of March 3, 1863, c. 75,—read: "Every judge advocate of a court-martial or court of inquiry." The words "or court of inquiry" were omitted by Congress in enacting the Revised Statutes. See Chapter XIII.

[2] See also (in Appendix) Army Act § 72, and Rule of Procedure 124, as to the special court of inquiry for the investigation of cases of unauthorized absence.

[3] As to its nature, compare Adye, 83; Delafons, 46; Tytler, 343–346; Simmons § 334; Hough, 28; Harcourt, 173–4; Hughes, 160; Fonblanque, 220; Maltby, 137; De Hart, 273–4; 3 Greenl. Ev. § 475; DIGEST, 135–6 and note; Trial of Capt. D. Porter, (Navy,) p. 10. In the British Rules of Procedure, 123 (D,) it is said:—"A court of inquiry has no judicial power, and is in strictness not a court at all, but an assembly of persons directed by a commanding officer to collect evidence with respect to a transaction into which he cannot conveniently himself make inquiry." In U. S. *v.* Clarke, 3 Fed., 710, it was held that a report of a military court of inquiry, exonerating an enlisted man from liability in connection with an act subsequently charged before a civil tribunal as murder, (not being a finding of a trial court,) could not be pleaded in bar as an acquittal before such tribunal. The ruling of the court in this case, however, is placed upon a different ground, elsewhere considered.

[4] Kennedy, 239; Coppée, 95; DIGEST, 135, note. In Simmons § 334; Harcourt, 174, and Griffiths, 133, it is styled a "*council*." In the late case of The W. B. Chester's Owners *v.* U. S., 19 Ct. Cl., 683, the court say:—"A naval or military court of inquiry is not a judicial tribunal. It is instituted solely for the purpose of investigation, as an assistance to the President, the head of the Department, or the commanding offi-

Its Character and Significance Illustrated. But the court of inquiry, though only a *quasi* judicial body, is an instrumentality of no little scope and importance; its investigations are frequently much more extended and its conclusions more comprehensive than would be those of a court-martial in a similar case; and, in individual instances, its results may be scarcely less final than if it had the power to convict and sentence.[1] It is mainly, however, as contributions to history or to the annals of the Army, that the researches of the courts under consideration are significant and valuable. Thus among the courts of inquiry held in our army of which the reports have proved to be important State papers, may be cited the following:—

That convened in the case of Major John André, Adjutant General to the British Army, by General Washington as Commander-in-chief, on September 29, 1780, under the name of a "Board," and consisting of six Major Generals, [Greene, (the president,) Lord Sterling, St. Clair, the Marquis de la Fayette, Howe, and the Baron de Steuben,] and eight Brigadier Generals, [Parsons, Clinton, Knox, Glover, Patterson, Hand, Huntington, and Starke,] with John Lawrence, Judge Advocate General, as recorder, and directed "to report a precise state of the case," with an "opinion of the light in which he (André) ought to be considered and the punishment that ought to be inflicted." The Court, after considering the evidence, reported a statement of the

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cer, in determining whether or not any further proceeding, executive or judicial, ought to be taken in relation to the subject-matter of the inquiry. There is no issue joined between parties, and its proceedings are not judicial."

[1] As where the report of the court has served as the ground and occasion for the summary dismissal of an officer. Tytler, 345-6; Prendergast, 211. And see cases in G. O. 15 of 1835; Do. of Nov. 23, 1844; Do. 183 of 1862; Do. 12, Dept. of the Tenn., 1863, (case of eight officers of the 109th Ills. Vols.) Compare also the result in the case of André, (*post*,) who was hung as a spy on the fourth day after the conclusion of the proceedings of the court of inquiry.

facts found, with an opinion that the accused "ought to be considered as a spy from the enemy, and that, agreeable to the law and usage of nations, he ought to suffer death:"[1]

That convened in 1791, by direction of the President, in the case of Brig. Gen. Harmar, to inquire into his conduct as commanding officer on the expedition against the Miami Indians in 1790:[2]

That convened by President Jefferson in 1808, in the case of Brig. Gen. Jas. Wilkinson, to investigate the charge of his having coöperated with the Spanish government of Louisiana adversely to the United States. A trial by court-martial followed in 1811, at which he was fully acquitted:[3]

That convened by an order of President Madison of January 21, 1815, in the case of Brig. Gen. W. H. Winder, to inquire into his conduct as commanding officer of the U. S. forces during the British attack on Washington in August, 1814:

That convened by President Jackson, at Frederick, Maryland, in November, 1836, to inquire into "the causes of the failure of the campaigns in Florida against the Seminole Indians, under the command of Gens. Gaines and Scott," and also into the campaign against the hostile Creeks:[4]

That convened by President Van Buren, at Knoxville, Tenn., in September, 1837, "to examine into the transactions of Bvt. Brig. Gen. Wool, and others of his command, in reference to his and their conduct in the Cherokee country:"[5]

That convened in Mexico, by G. O. 186, Hdqrs. of the Army, 1847, at the instance of Brig. Gen. Worth, to inquire into certain matters connected with the capitulation of Puebla, in which he conceived himself injured by Gen. Scott.

That convened in 1848, in the City of Mexico, in the case of Maj. Gen. Pillow, which investigated charges preferred against that officer by Maj. Gen. Scott, in regard to official reports made by the former of the battles of Contreras, Churubusco, &c.:"[1]

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[1] Proceedings published, Philadelphia, 1780; reprinted, Albany, 1865.

[2] American State Papers, Military Affairs, vol. I, pp. 20–36.

[3] G. O. of Feb. 14, 1812.

[4] G. O. 13, of March 21, 1837; Doc. 224, Senate, 24th Congress, 2d Session. And see American State Papers, Military Affairs, vol. VII, pp. 125–465.

[5] G. O 63, of Oct. 2, 1837; American State Papers, Military Affairs, vol. VII, pp. 532–571.

That convened by the President at Washington, in September, 1862, "to investigate the circumstances of the abandonment of Maryland Heights and the surrender of Harper's Ferry:"[2]

That convened by the President, by Special Orders No. 356, of November 20, 1862, at Cincinnati, Ohio, "to investigate and report upon the operations of the army under the command of Maj. Gen. D. C. Buell, U. S. Vols., in Kentucky and Tennessee:"[3]

That convened by Special Orders No. 350, Headquarters of the Army, 1862, to inquire into the conduct of Maj. Gen. McDowell as a general officer during the first year of the late war:[4]

That ordered by the President, by S. O. 217 of 1868, in the case of Brig. Gen. Dyer, Chief of Ordnance, which was charged especially with the duty of examining into certain accusations made against that officer in a report of a Committee of Congress:[5]

That ordered by the President, by S. O. 35 of 1874, in the case of Brig. Gen. Howard, under the provisions of a Joint Resolution of Congress of Feb. 13, 1874, and directed, as required by the Resolution, "to fully investigate" certain indicated charges against said officer, "and to report their opinion, as well upon moral as upon technical and legal responsibility for such offences, if any, as may be discovered:"[6]

That ordered by the President, by S. O. 277 of 1879, in the case of Lieut. Col. Warren, Corps of Engineers, "for the purpose of inquiring into his conduct as major general commanding the 5th Army Corps, at the battle of Five Forks, Virginia, on April 1, 1865, and into the operations of his command on that day and the day previous:"[7]

That convened by direction of the President, by S. O. 241, of

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[1] G. O. 40, of July 2, 1848.

[2] G. O. 183, of Nov. 8, 1862. This court was designated a "Military Commission."

[3] The proceedings were never promulgated in Orders.

[4] Rebellion Record, Series I, Vol. XII, Part I, pp. 36 to 332.

[5] G. O. 51, of May 15, 1869. Proceedings printed at Govt. Printing Office, 1869.

[6] G. O. 75 of 1874; Proceedings printed at Govt. Printing Office, 1874.

[7] G. O. 132 of 1882; Proceedings printed at Govt. Printing Office, 1883.

October 31, 1883, "to investigate the organization and fitting out of the Greely relief expedition party, transported by the steamer Proteus:"[1]

That convened by direction of the President, by S. O. 93, of 1884, to investigate certain charges, preferred by a civilian, A. E. Bateman, against Brig. Gen. D. G. Swaim, Judge Advocate General of the Army, the report of which formed the basis of the subsequent court-martial proceedings published in G. C. M. O. 19 of 1885.[2]

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[1] "Proceedings of the 'Proteus' Court of Inquiry on the Greely Relief Expedition." Govt. Printing Office, 1884.

[2] The proceedings of the court of inquiry are contained in a volume published at the Govt. Printing Office, 1884.

Among other important courts of inquiry in the army may be mentioned those in the following cases:—Case of Lieut. Lane, charged with assaulting a member of Congress. (G. O. 15 of 1835.) Case of Private Delap, involving a construction of the present Thirtieth Article. (G. O. 13 of 1843.) Case of Capt. P. S. Cooke, reiating to protection given to traders in Texas. (G. O. 6 of 1844.) Case of Asst. Surg. Byrne, relating to a collision between him and Surgeon General Lawson. (G. O. 42 of 1849.) Case of Col. D. S. Miles, charged with misconduct at the battle of Bull Run. (G. O. 42, Army of the Potomac, 1861.) Cases of a Colonel and a Captain of Vols., charged with misconduct at the same battle. (G. O. 30, Dept. of N. E. Va., 1861.) Case of Brig. Gen. Martindale—inquiry into a charge preferred against him by Maj. Gen. Porter. (G. O. 178 of 1862.) Case of the burning of the steamer Ruth. (G. O. 344 of 1863.) Cases of certain corps, &c., commanders, as to their conduct in the battles of Sept. 19th and 20th, 1863. (Court ordered in G. O. 322 of 1863. Result not promulgated.) Case of members of the 109th Ills. Infy., charged with disloyalty. (G. O. 12, Dept. of Tenn., 1863.) Cases of Col. A. A. Gibson, 2d Pa. Arty., and Col. C. M. Alexander, 2d Dist. Col. Vols., as to details of the command and discipline of their regiments, &c. (G. O. 22, 139, Dept. of Washington, 1864.) Case of an inquiry into the transactions of the commanding officer in charge of the Hualpai Indians in Arizona in 1874-5. (G. O. 6 of 1876.) Case of Lt. Col. Eddy and Capt. Martin, Quartermaster Dept., as to the administration of the Q. M. Depôt at San Francisco, and certain frauds committed therein. (G. O. 10 of 1877.) Case of Major Reno—as to his conduct at the battle of Little Big Horn River, on June 25th and 26th, 1876. (G. O. 17 of 1879.) Case of an inquiry instituted on the application of Col. E. A. Carr, as to a hostile expedition against Apache Indians in August, 1881. (G. O. 125 of 1882.) Case of an inquiry into the administration of the post of Fort Coeur d' Alene, between 1879 and 1886. (G. O. 47 of 1887.) Case of an inquiry into matters connected with the administration of the affairs of the 11th Light House District, by Major William Ludlow, Corps of Engineers. (S. O. 302 of 1892.) Also courts of inquiry held in the cases of officers charged with the

III. ITS CONSTITUTION.

Authority of Commanding Officer and President respectively. It is provided, as has been seen, in Art. 115 that—"*A court of inquiry may be ordered by the President or by any commanding officer,*" but, for a certain reason stated,[1] "*shall never be ordered by a commanding officer except upon a demand by the officer or soldier whose conduct is to be inquired of.*"

The comprehensive designation—"any commanding officer"[2] indicates that the authority to constitute courts of inquiry is not necessarily restricted, as has sometimes been supposed,[3] to commanders who would be authorized to convene courts-martial in the same cases, but properly includes any and every "commanding officer," as the term is understood in the service;[4] the power conferred being thus made incident to distinctive command as such. Thus the commander of a district, post, regiment, or independent company or detachment, may order this court with the same legality as may the commander of a department or army. The exercise, however, of such authority on the part of an inferior commander, or in a case of a soldier, is of rare occurrence in our service.[5]

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shooting, &c., and killing of mutinous or insubordinate inferiors, mostly in time of war, and of which conclusions are published in the following Orders:—G. O. 29, Dept. of N. E. Va., 1861; Do. 46, Army of the Potomac, 1862; Do. 30, Banks' Division, 1862; Do. 5, Dept. of N. Mexico, 1863; Do. 76, Dept. of W. Va., 1864; Do. 20, Dept. of the Platte, 1871. With which see O'Brien, 76, as to case of Col. Parrish, Florida, 1836. Other courts of inquiry than those here specified will be noticed in the course of the Chapter. Proceedings of important Courts of Inquiry in the Confederate States army are published in G. O. 19, A. & I. G. O., Richmond, 1861; Do. 28, 108, Id., 1862; Do. 81, 152, Id., 1863.

[1] In 8 Opins., 342, Atty. Gen. Cushing comments forcibly on this part of the Article, concluding with the expression of opinion that "the reflection on officers of the army" contained in it is "unjust and out of place."

[2] A similar designation is employed in the British law. Rules of Procedure, 123.

[3] G. O. 78 of 1880.

[4] For a definition of this term, see Chapter IX—"By whom arrest is to be imposed."

[5] The proceedings of a court of inquiry in the case of an enlisted man, charged with killing a public horse by hard riding, are published in G. O. 27, Dept. of Cal., 1867.

The authority, however, of the commanding officer is not unqualified, but subject to the limitation prescribed in the last clause of the Article; it can be exercised only conditionally upon the court being "demanded" by the interested party. It is the President alone whose authority under the Article is absolute, and he may avail himself of this authority either by himself convening the court in Orders from the War Department, or by directing the same to be convened by a military commander.

Discretion of Convening Official. But the exercise of the authority, whether absolute or conditional, is discretionary. Neither the President nor a commanding officer is *obliged* to order the court under any circumstances; the question whether or not a court shall be ordered in a particular case being one to be determined, not merely by the wishes of the aggrieved party, but also and mainly by such considerations of expediency or justice as may address themselves to the superior. The word "demand," as employed in the Article, does not imply a right on the part of the officer or soldier, but is to be construed as synonymous with *requested or applied for.* It is optional, therefore, with a commanding officer to refuse the application; but, in the event of such refusal, the party, if not satisfied, may appeal to higher authority, as in any other case of an official request not granted by an immediate commander. Applications for courts of inquiry are in fact not unfrequently refused, on the ground that to order the same would be opposed to the interests of the service.

The Convening Order, &c. The *form* of constituting a court of inquiry is by a General or Special Order, similar to that employed for ordering a court-martial and detailing the members; the only difference being that, in lieu of a reference to a trial or trials to be had, the Order specifies a charge, subject, or question to be investigated, and further directs either that the court shall report the facts alone, or the facts with its opinion thereon,—with such additional orders or instructions, if any, as it may be deemed proper to subjoin. At any subsequent state of the inquiry, a supplemental Order may be issued by the convening authority, relieving a member, detailing a new member or recorder,[1] adding to or modifying the instructions originally given,[1] changing the time or place of meeting, &c.

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[1] "It is not absolutely necessary that the same members should go through the whole of the inquiry." Harcourt, 174. And see Simmons § 333; De Hart, 277, note; Harwood, 161.

IV. ITS COMPOSITION.

Art. 116. This Article provides that: "*A court of inquiry shall consist of one or more officers, not exceeding three.*" As to the word "officers"—what has been said in the Chapter on the Composition of General Courts-martial, in construing the same word as employed in Art. 75, will be for the most part applicable here.

Number of Members. A detail for the court of *less* than three commissioned officers has been of the rarest occurrence in our service.[2] In a few cases indeed—as in the case of the court convened upon the application of Gen. Warren—a court originally composed of three members has been reduced to two in the course of its investigation, and has gone on and concluded with that number. In the case of André, the court, (convened before the enactment of the Article fixing the number,) was, as has been seen, composed of fourteen members. In the recent case of Gen. Howard, above noticed, it was specially provided in the Joint Resolution that the court should "consist of not less than five officers," and it was in fact constituted with seven members.[3]

Rank of Members. On this point the law is silent. Art. 79, in providing that "no officer shall, when it can be avoided, be *tried* by officers inferior to him in rank," applies of course only to courts-martial. Its injunction, however, will naturally and properly be observed in composing courts of inquiry, so far as the exigencies of the service will permit.

V. ITS FUNCTION.

In what it Consists The function of the court of inquiry in our service appears from Arts. 115 and 119. In the former its general purpose is indicated to be—"*to examine into the nature of any transaction of, or accusation or imputation against, any officer or soldier.* By the latter, it is required to "*give an opinion on the merits of the case,*" when "*specially ordered to do so.*"

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[1] See Coppée, 98.

[2] A court of inquiry with but *one* member is convened by G. O. 36 of 1837.

[3] The British law simply provides that the court "may consist of any number" of officers, (Rules of Procedure, 123;) but the number has generally been three or five. In the Inquiry upon the Cintra Convention, in 1808, and also in the case of Col. Home, (Home *v.* Bentinck, 2 Brod. & Bing., 131,) the number was seven.

The Investigation. The subjects of investigation contemplated by the Article are of two general descriptions:—*transactions* of officers or soldiers, a comprehensive term which may include any acts whatever, though commonly confined to acts of a supposed questionable or exceptional character; and *accusations or imputations*, that is to say charges of crime or misconduct, either direct and specific, or indirect and informal, and proceeding from any competent or respectable source. More particularly, however, there are three[1] principal uses and purposes for which investigations by courts of inquiry are resorted to in practice, as follows:—

1. For determining whether there should be a trial by court-martial in a particular instance. As where accusations have been made, or circumstances of a criminating character have been reported, against a certain military person;[2] or where, a crime or disorder having apparently been committed by several military persons, it may be doubtful what particular individual or individuals may be implicated or punishable;—in such cases a court of inquiry may often profitably be convened with directions to report all the facts, and, (as is generally required,) to express also an opinion whether or not a court-martial should be ordered for the trial of the person or persons accused or found chargeable. The court of inquiry, when acting in this capacity, has been frequently compared to a grand jury;[3] but, as the party whose conduct is under investigation may be present with counsel, and be heard in his defence, at its sessions, and its proceedings may be and generally are public, the analogy indicated is by no means complete.[1]

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[1] See 6 Opins. At. Gen., 239.

[2] The ground of complaint may be advanced by *civilians*. See an old case in G. O., Hdqrs., Newbury, June 19, 1782, of a court of inquiry ordered "to inquire into the causes of a complaint exhibited by citizens of the State of Pennsylvania," against certain officers and soldiers. And see case of Gen. Swaim, *ante*, p. 801; also case in G. O. 47 of 1887.

[3] See Adye, 54, 172; 1 McArthur, 108; Tytler, 223, 340; Hough, 711; Prendergast, 208, 211; Clode, M. L., 196–198; Maltby, 136; De Hart, 120; 8 Opins. At. Gen., 347.

2. For the purpose simply of informing and advising the convening official. These courts are also employed to investigate cases, which appear to call, not for trial by court-martial, but for some other military or administrative action, and in which the testimony is so multifarious, complicated, or conflicting that a formal inquiry is needed for the purpose of ascertaining and reporting what are the actual facts, and thus reliably informing the President or Commander, and assisting his judgment. This, with or without an opinion—as he may direct—as to the bearing of the facts upon the discipline of the service, the rights or liabilities of individuals, &c.[2] In cases indeed where but a brief investigation will be sufficient, the same is not unfrequently made through an ordinary board detailed for the purpose, or through the judge advocate or inspector general of the command. It is only for such important investigations of this class as will involve the taking of a mass of testimony and the giving of a full hearing to the officer, (or soldier,) whose acts have given rise to the proceeding, that a court of inquiry is, in general, ordered.[3]

3. For the vindication of character or conduct. This instrumentality is also not unfrequently resorted to, as a species of *court of honor*, for the exculpation or justification of an officer, (or soldier,)whose reputation or action has been seriously aspersed or injuriously criticized in some official report or authoritative publication, or who has been severely rebuked or censured by a military superior, or who deems himself to have been otherwise aggrieved in his military capacity. In such cases the court is usually applied for by the party himself according to the provision of Art. 115.[4] Though the primary object of the inquiry is vindication, the result may indeed be quite the reverse.

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[1] DIGEST, 136; McNaghten, 176–7.

[2] See Tytler, 343; Simmons § 334; Kennedy, 239; 6 Opins. At. Gen., 242; 8 Id., 341.

[3] "Thus a court of inquiry may have in charge a comprehensive subject, such as the cause of the loss of a battle, the conduct of a particular corps or ship in a combat or engagement, the general condition of some administrative branch of the service, and other matters of that nature" 8 Opins. At. Gen., 341. And see 6 Id., 242; Simmons § 334.

[4] Instances may occur where two officers who have become involved

It is to be remarked that the several objects above indicated are not necessarily kept distinct and separate in practice, but may, where the circumstances make it proper, be combined in the investigation ordered.

The investigation not to be diverted to foreign matter. Though considerable latitude is to be conceded to the court in its inquiry, it will not be warranted in examining a subject quite distinct from that which it has been directed to investigate. Still less where it has been ordered to investigate certain charges, will it be justified in taking into consideration *other* charges against the same person, or any charges against a *different* person.[1]

To be confined to cases of persons in the army. The term "*officer or soldier*," employed in the Article, clearly means one who is an officer or soldier of the army at the time the court is ordered.[2] Transaction of or accusations against persons who have been members of the army, but who have left it and become civilians, while the same may be indirectly involved in an investigation, are not *per se* legitimate subjects for direct inquiry by this court, even though the inquiry be limited to their acts and conduct while in the army. For such an inquiry would be futile so far as concerned *action* by the military authorities.

Not to be affected by the statute of limitations. The military statute of limitations—Art. 103—applies only to proceedings before courts-martial. There is no legal obstacle, therefore, to a court of inquiry taking cognizance of a particular transaction or matter of accusation dating back more than two years prior to

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in controversy may each apply for a court of inquiry in regard to the same transaction. In such cases the court, if convened, will practically, in the words of Williamson, (2 Mil. Ar., 132,) "sit as a court of arbitration between the contending parties, the decision of which they have consented to abide by."

[1] See Benét, 230.

[2] Thus a court of inquiry could not legally be ordered to investigate charges against a contract surgeon. DIGEST, 136.

In G. O. 50, Mil. Div. of West Miss., 1864, are published the proceedings of a body, in form a court of inquiry, but designated a "*council of war*," by which was investigated the question whether a brigadier general commanding the enemy's forces at Fort Morgan, Ala., had violated the laws of war in connection with the surrender of that post.

the ordering of such court, and it may accordingly extend its examination to acts and occurrences of the past without regard to the period which has since elapsed.[1] A peculiar advantage indeed of these courts over courts-martial is that they are empowered to investigate a series of acts or course of conduct—such as the administration of an office, the execution of a special trust, the management of an expedition or a campaign, the keeping of a continued account of receipts and disbursements, &c., embracing, in their relations, a considerable number of years, or any indefinite period. While in practice these courts will rarely be called upon to go into transactions remote in time, it is yet the fact that some of the most conspicuous instances in which courts of inquiry have been resorted to in this country have been cases in which a trial by court-martial was held to be barred by the lapse of the statutory period, and a court of inquiry remained the only means by which the facts could be satisfactorily investigated or the person vindicated or the reverse.[2]

The Opinion—*Art. 119.* In view of the positive terms of this Article, the court, unless expressly required to give an opinion, could scarcely properly make even a recommendation or suggestion as to the merits of the case, since the same would in general involve a certain measure of opinion.

As required and rendered. The opinion required of a court of inquiry is, in general, as already indicated, an opinion whether, upon the facts as developed by the investigation, a particular officer or soldier, or any officer or soldier, should properly be brought to trial by court-martial; or whether any *other*, and if any what, action is called for by the interests of the service, or is otherwise desirable to be taken. The court may be directed to furnish separate opinions upon several different points involved in the case,[1] and also to give its *reasons* for its opinions.[2] Where ordered to render an opinion upon a specific subject, or to a certain particular effect, it should confine itself strictly to the same: it cannot assume to express an opinion upon a different matter or to a different effect without transcending its authority and becoming liable to censure.[3]

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[1] G. O. 24 of 1829; 6 Opins. At. Gen., 239; 8 Id., 349; Macomb, 94; Harwood, 168; Benét, 183–5. And see Debate in Senate on case of Gen. Howard, Cong. Rec., 1874, No. 40, pp. 36–8. De Hart, (p. 281–3,) misapprehends the law on this point; as did also the court of inquiry in Ast. Surg. Byrne's Case, (G. O. 42 of 1849,) and in Col. Alexander's Case, (G. O. 139, Dept. of Washington, 1864.)

[2] In the cases both of Gen. Dyer and Gen. Howard, the charges and transactions dated back beyond the period of the statutory limitation.

Dissenting opinions. Though it is *the court* which is called upon to give an opinion; *i. e.*, though it is contemplated that the opinion given shall be the opinion of the court; yet as the opinion of a court of inquiry is not a *judgment*, it is not deemed to be necessary that the same, as rendered, should be unanimous or single, nor is the fact that the majority concur in a certain opinion regarded as precluding, (as in a case of a court-martial,) the expression of their dissent by the minority. When a joint opinion cannot be united in by all the members, dissenting opinions must be given or none at all; and in a case of dissent, it is not only proper, but desirable for the instruction of the reviewing officer, that the different conclusions arrived at by the different members be formally reported in the record.[4] But dissent of course is to be avoided where practicable, and the members will always preferably concur when they can do so without a sacrifice of just and reasonable views.

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[1] See instances of opinions thus dispersed, in G. O. 13 of 1837; Do. 40 of 1848; Do. 42 of 1849.

[2] As in the case of the Inquiry in regard to the Proteus expedition. S. O. 241 of 1883.

[3] Hough, (A.) 8; Harcourt, 174; Macomb, 93; O'Brien, 291; De Hart, 277; Coppée, 98.

[4] "The very disagreement indeed of intelligent minds is a material and important fact in the case, and one of which the reviewing authority is entitled to have the advantage in his consideration of and action upon the case." DIGEST, 138.

In the Inquiry on the Cintra Convention, in 1808, the members who were "of a different opinion from the majority" were *required* "to record upon the proceedings their reasons for such dissent," and three of the members accordingly did so. Simmons § 339, and note; Hough, (A.) 4. The last author, (Precedents, 642,) cites another case in which two of the five members of a court of inquiry gave dissenting opinions. *Contra*, O'Brien, 291, in holding dissenting opinions not permissible, proceeds upon a supposed analogy between the judgment of a court-martial and the conclusion of a court of inquiry, which does not exist in fact or in law.

Incidental remarks. Though the court may not volunteer opinions not called for, it may, in connection with its opinion or report of facts, *remark* upon matters extraneous to the subject of investigation, but legitimately within its observation, for the purpose of bringing the same to the attention of the reviewing officer,—such, for example, as disrespectful or otherwise irregular conduct on the part of the accused or accuser, or on the part of counsel or a witness.[1]

VI. THE RECORDER.

His Province and Duties. Although it is provided in Art. 116 that—"*A court of inquiry shall consist of*" certain officers "*and a recorder*,"[2] the special use and purpose of this latter officer is added as follows, *viz.:* "*to reduce the proceedings and evidence to writing.*" So, in Art. 117, while it is provided that the members of the court shall be sworn to "*examine and inquire*," the recorder is required to be separately sworn to "*accurately and impartially record the proceedings of the court and the evidence.*" Thus, like the judge advocate of a court-martial, the recorder is clearly distinguished from the members, and the provision cited of Art. 116 has never been construed in practice as making him a part of the court.

He is further assimilated to the judge advocate in that he is empowered and required by Art. 117 to qualify the members by administering to them the prescribed form of oath; that by Art. 118, he is authorized to summon and examine witnesses; and that, by Art. 120, he is required to authenticate, with the president, the completed proceedings.

The principal regular *duties* of the recorder are to secure the attendance of the witnesses, and to swear them and conduct their examination, (cross-examining also, if desirable, those introduced by the other party, if there be one,) and to prepare the record of the court. He also assists the court in procuring such documentary or written evidence as may be required; but as Art. 91, relating to *depositions*, evidently contemplates the taking of the same mainly at least for use on trials by courts-martial, he will comparatively rarely be called upon to obtain testimony in this form.

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[1] Hough, 29. And see G. O. 13 of 1837, as to the animadversions of the court of inquiry upon the reprehensible language used in regard to each other by Gens. Gaines and Scott, the two officers concerned, the one in his address to the court, and the other in his official communications which were put in evidence.

[2] The Articles of the late code of 1806, (in force prior to June 22, 1874,) termed this officer "judge advocate," and "judge advocate or recorder." The "judge advocate" of the court of inquiry in Gen. Dyer's case, (convened in 1868,) was authorized, in a Special Order from the War Department, to appoint an "assistant judge advocate." Published Record, p. 1.

Not a Prosecutor or Law-Officer. The recorder, however, unlike the judge advocate, is not a prosecuting officer, since the investigation is not a trial, nor will he properly assume the *rôle* or manner of a prosecutor. Further, he is not invested, like the judge advocate, with the capacity of adviser to the court. A court of inquiry, having confidence in the legal ability of its recorder, may indeed properly call upon him to assist it in examining the law applicable to the case before it, but this is no *duty* of a recorder; moreover it will not often come within the province of a court of inquiry to pass upon questions of law of a difficult or unfamiliar character.[1]

VII. THE PROCEDURE.

The Meeting of the Court—Attendance of Parties. The court assembles at the place and time named in the Order convening it. If all the members do not attend on the first day, it is customary for the others to adjourn from day to day till all are present, with the recorder.

The "party accused" is entitled, by Art. 118, to be present so far as to take part in the examination of the witnesses, and in practice he is permitted to be, and generally is, present from the beginning and throughout the proceedings,[2] though his presence is not at any stage obligatory or essential. He is sometimes indeed, though rarely, *ordered* to be present,[3] and in such case must attend, though his absence may not affect the authority of the court to proceed.

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[1] In the exceptional case, however, of Gen. Howard, already noticed, the court was specifically required to express an opinion not only upon the "moral" but upon the "technical and legal responsibility" of the officer.

[2] He should properly be furnished with copies of the convening Order, and other Orders, if any, fixing or changing the time or place of the meeting of the court.

[3] Simmons § 335; Hough, 25, 437; James, 317; De Hart, 275. The court has no power to command his obedience, but the commanding officer only. Simmons § 334; Griffiths, 133.

To place the accused party in *arrest* prior to the convening of the court, or pending its continuance, would be opposed to the present usage of the service, and scarcely justified except in an extreme case.[1]

The party accused, or "whose conduct is inquired of," is entitled to be *present* (with *counsel*, if desired[2]), and to examine and cross-examine the witnesses similarly as before a court-martial; and, under the existing law, he may himself take the stand as a witness. He may also present an argument or statement at the close. The inquiry, however, not being a trial, his presence thereat is not essential. The *accuser*, where there is one, has also generally been allowed to be present,[3] and with his counsel;[4] and a similar privilege is properly extended to an officer whose conduct will be materially *involved* in the inquiry.[5]

Challenge of Members. The full court being in attendance, the convening Order is read, and the accused or interested party, is afforded the same opportunity of challenge as upon a trial by court-martial. To this privilege indeed he is not legally entitled, since, by the terms of Art. 88, it is only "members of a court-martial" who "may be challenged by a prisoner." In strict justice, however, to the party, and with a view to an impartial inquiry, such privilege is now always extended in our service.[1]

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[1] Hough, (A.) 8; Griffiths, 134; De Hart, 279; Lee, 83. So, in the navy, the officer need not be put under suspension. Harwood, 163. The case of André was of course an exception: at the end of the proceedings, the record states that he was "remanded into custody." In the early case of Major Wyllys, of our own army, Congress, in providing for a court of inquiry, expressly directed that he be "arrested and remain in arrest" till it should further order, and, at the end of the proceedings, it directed that he be "released from his arrest." 4 Journals, 625, 676.

[2] See De Hart, 276; Benét, 182; Coppée, 99; Harwood, 163.

[3] De Hart, 276. Benét, 181–2; Coppée, 98. In Gen. Dyer's Case, as also in Gen. Swaim's, the counsel of the accusers constantly attended, and took upon themselves the *onus* of making good the charges.

[4] Kennedy, 240; Hough, (A.) 8; De Hart, 276; Benét, 181. Gen. Scott, as accuser, attended the court of inquiry in the case of Gen. Pillow, in Mexico, in 1848.

[5] Proteus Court of Inquiry, pp. 2, 3.

In the special case of Gen. Howard, it was, as has been seen, expressly provided by Congress that the accused should "*be allowed the same right of challenge as allowed by law in trials by court-martial;*" but this provision was only declaratory of the existing practice as established by usage, and was unnecessary to secure the privilege to the party.[2]

Wherever the opportunity of challenge is availed of, the proceedings had will be similar to those before courts-martial in like cases, as fully set forth in Chapter XIV. If a challenge to one of a court of three members is allowed, it will in general be better to adjourn and await the action of the convening authority, since a court of two members, though legal, does not permit of a majority vote in a case of disagreement.

Organization, Sittings, &c.—***Administering of the oath.*** Such objections to members as have been made, (if any,) being disposed of, the members and recorder are sworn according to the form and in the manner set forth in Art. 117.

Obligation of secrecy. The oath, it may be remarked, imposes upon neither members nor recorder any obligation of secrecy similar to that enjoined by their oath upon the members and judge advocate of a court-martial; so that the opinion of the court may be divulged without any violation of the oath as prescribed. But, in law, the opinion of a court of inquiry is assimilated to the judgment of a court-martial in that it is a confidential and privileged official communication addressed to the convening authority and intended as a basis for his action alone, and it is readily perceived that a disclosure of such opinion before such action was taken might, (especially in a case where the court had been sitting with closed doors,) seriously embarrass the commander or the President in his disposition of the case, and perhaps materially prejudice the interests of the accused party in the event of a trial being ordered.[1] It has therefore been held both by English and American writers[2] to be highly unmilitary and indecorous for a member or the recorder of a court of inquiry to discover, either to the accused or other person, the opinion or recommendation of the court, without the authority of the convening official or before the same is published in orders.

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[1] See Macomb, 94; O'Brien, 292; De Hart, 278; Benét, 181; Coppée, 98; Harwood, 163. The privilege was recognized as far back as at the inquiry in the case of Gens. Scott and Gaines in 1837.

[2] This was admitted in the debate in both Houses of Congress. Cong. Rec., Nos. 38 and 40, 1874.

The oaths having been administered, the court is organized for the *inquiry*.

Whether session to be open or closed. Before, however, entering upon the investigation, a question generally to be determined is, whether the court shall sit with open or closed doors. Courts of inquiry, instituted as they are to assist by their researches the judgment of the President or the military commander, and making reports addressed as confidential communications to his discretion, would appear from their very nature and purpose to be properly close courts.[3] Admission to them, in the absence of statutory regulation on the subject, is declared to be, strictly, not of right.[4] But from an early period these courts, even in England, have sometimes been open;[5] and, in *our* law, Art. 118 provides for the admission of the accused and the witnesses, while, by custom, the accuser, the counsel of both parties, and the necessary clerks are permitted to be present. From this it is but a short step to admit the public, and the result is that, with us, courts of inquiry, unless otherwise instructed in Orders, are in general held as open courts.[6] It is indeed always competent and proper for the convening authority to direct, in the convening or a supplemental Order, whether the court shall be open or closed.[1] But if—as is usually the case—the Orders are silent on the subject, the court is empowered to decide the point for itself by vote, or, without raising the question, to go on sitting with open doors from the beginning.[2] In a case where the result of the inquiry, as it is developed in the course of the testimony, is such as to make it improper or impolitic that the court, originally open, should continue to be so, the doors will properly be closed during the rest of the investigation,[3] all persons being excluded except those entitled or privileged by law or usage to be present, and the witnesses being admitted separately.[4] Of course, upon the final deliberation, or where it is desired to consider without publicity some interlocutory question, the court, if open, is cleared, and the doors are closed, in the same manner as in the case of a court-martial.[5]

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[1] Home *v.* Bentinck, 2 Brod. & Bing., 130, 164; Hough, 26; Clode, M. L., 199; De Hart, 280; Benét, 182; Harwood, 168.

[2] See authorities cited in last note; also Hough, (P.) 653; Hughes, 163; O'Brien, 291.

[3] "These courts being held for the purpose of obtaining information, upon which an ulterior decision is to depend, are necessarily close courts." Kennedy, 240. "All courts of inquiry are inherently close courts." Hough, (P.) 645. And see Simmons § 337; Clode, M. L., 196; Benét, 182; 8 Opins. At. Gen., 346.

[4] "Defendants generally, and auditors and spectators occasionally, have access by grace and not of right." Hough, (P.) 645. And see other authorities cited in the last note.

[5] The Inquiry on the Cintra Convention was closed for the first two days. On the third day it was opened, a minute being made in the proceedings that—"the guard being withdrawn, strangers are allowed to enter." See Hough, (A.) 11.

[6] Macomb, 92; O'Brien, 291; De Hart, 276; Harwood, 163; 8 Opins. At. Gen., 346; Lee, 82; DIGEST, 136. In the recent case of Gen. Swaim, the court, (p. 27,) voted to sit with open doors.

Hours of session. A court of inquiry, (in the absence of special instructions on the subject,) may sit "without regard to hours," beginning and ending its daily sessions at such hours as may be convenient for itself and the parties interested.[6] The provision of Art. 94 prescribing certain fixed hours applies only to "proceedings of *trials*."

Adjournments. The granting of "*continuances*," as such, is, by Art. 93, in substance restricted to occasions of trials before courts-martial. A court of inquiry, however, may, from time to time during an investigation, grant or take such adjournments as may be expedient and reasonable.[7]

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[1] Hough, (A.) 11; Do., (P.) 639; Simmons § 339. Griffiths, 132; De Hart, 276; 8 Opins. At. Gen., 229.

[2] See De Hart, 276; Benét, 182; Coppée, 99; Harwood, 163.

[3] See Hough, 26; Macomb, 92; De Hart, 276; Harwood, 163; 8 Opins. At. Gen., 347.

[4] Hough, (P.) 640.

[5] "Generally the court sits with open doors, except when deliberating and voting." O'Brien, 291.

[6] De Hart, 279; Benét, 182; Coppée, 99. In this connection, Hough, (Practice,) 137, observes—"Though Sunday is not a day for sitting, still there may arise cases requiring a court to sit on Sunday."

[7] In the Order convening the court of inquiry in the case of Gen. Buell, the court was specially authorized to "adjourn from place to place as may be desirable, for the convenience of taking testimony."

Keeping of order—Contempt. The presiding officer acts as the organ of the court, and keeps order as in the case of a court-martial. But a court of inquiry, having no original judicial authority, and not being embraced within the description of Art. 86, which applies in terms only to courts-martial and cannot, as a penal statute, be enlarged by implication, is not empowered to punish, as for a contempt, persons guilty of disrespect, disorder, or violence in its presence.[2] Where, therefore, witnesses or others misbehave at a session of a court of inquiry, while the court may cause them to be removed if desirable, it can procure them to be punished only by reporting the case to the convening authority or local commander, or to the civil authorities as the case may be.[3] In the event of a trial of the offender, the members and recorder, or any of them, will properly testify as prosecuting witnesses.[4]

The Investigation and Evidence—*Entertaining of charges, reports, &c.* Upon its organization, the court commonly proceeds at once to the matter of the inquiry, which it has been sworn to make truly and impartially "according to the evidence." Not unfrequently, as a starting point of the investigation, reports, correspondence, books, &c., or charges—which will properly be specific, but need not be in a technical form[5]—are laid before the court, either as referred to it directly by the convening authority, or furnished to and introduced by the recorder. Even though formal charges be offered, there is made, as already indicated, no *plea*. The accused, however, may take occasion to state—if such be the fact—that he admits certain allegations, thus simplifying the investigation.[6]

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[2] See DIGEST, 137 and note. The law on this point is misapprehended by De Hart, (p. 279,) and Benét, p. 182.

[3] As to witnesses, (Clode, (M. L., 198,) correctly says: "the court has no power to punish them for contumacy or silence."

[4] See Delafons, 53–4; Hough, (A.) 6.

[5] See Hough, (A.) 8; Maltby, 137; De Hart, 280; also G. O. 42 of 1849, (case of Ast. Surg. Byrne,) where there were ten specific charges preferred in the form of statements of fact. It is observed by Maltby: —"A complainant is not bound to exhibit the same charges before a court-martial which he produced to the court of inquiry. Formal charges have sometimes been preferred as the basis of the investigation." See cases in G. O. 65, 88, Fifth Mil. Dist., 1869.

[6] See O'Brien, 291.

Taking of testimony. The evidence is now entered upon, and, before courts of inquiry, the documentary evidence especially is often very considerable. The examination of the witnesses is conducted substantially as before courts-martial;—the accused availing himself, so far as desired, of the right recognized by Art. 118 to examine and cross-examine, by introducing witnesses of his own, and interrogating, impeaching, or objecting to the witnesses and testimony offered by the recorder; and the members of the court putting such questions as may be deemed desirable for the eliciting of the facts. Under the Act of March 16, 1878, c. 37, the accused, if he so elects, may take the stand as a witness, subject to cross-examination. The inquiry not being a judicial proceeding, the court is not called upon to enforce the rules of the law of evidence so strictly as would be, in general, a court-martial;[1] but founded as such rules commonly are upon justice as well as logic, it will ordinarily be safest and most equitable to observe them.[2]

Independently of his examination as a witness, the accused—it need hardly be remarked—is not now subject, as formerly,[3] to be interrogated by the court, or called upon for an explanation.

Closing argument. Upon the conclusion, however, of the testimony, the accused, (after reasonable time for preparation, if desired,) may make, in his defence, such closing statement or argument as he may deem for his advantage.[4] The recorder, with the assent of the court, (for, not being prosecutor, he is, strictly, without *right* in the matter,) may thereupon present a summary of the evidence with such remarks and arguments as the facts may properly suggest. Except, however, in cases of unusual importance, while the accused or interested party commonly submits a written address, the recorder, unlike the judge advocate, does not in general formally reply.

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[1] Hough, (A.) 9; Kennedy, 240; Hughes, 162.

[2] See D'Aguilar, 88; O'Brien, 291; De Hart, 332.

[3] See Hough, (A.) 5; as to the procedure in the Inquiry on the Cintra Convention; also Inquiry in case of André. This practice, however, has long been discontinued, as liable to criminate and unjust. See Tytler, 344; Adye, 81–2; Hughes, 162; Hough, (P.) 640; Simmons § 335; Coppée, 98.

[4] Subject of course to the authority of the court to restrict a statement containing disrespectful or otherwise improper expressions. See Chapter XVII.

Making up of report, &c., and record. The arguments, if any, having been delivered, the court, if open, clears for deliberation in the same manner as a court-martial. The recorder alone remains with it, to assist it in recurring to the testimony and preparing its report. After such discussion as may be found profitable, the report is drawn up; the court, where elaboration is called for, taking such adjournments as may be found necessary before their work can be completed. Although the court has been simply required to examine into and communicate the facts, this duty—it has well been remarked—is not duly performed by merely returning the proceedings with the testimony as taken from day to day, but a formal *summary* at least of the material evidence should properly be prepared and entered of record.[1] Such summary indeed the court may be directed, in the Order convening it, to present with its report.[2]

An *opinion*, if one has been required, will be added, and in such form and with such detail as may most fully and succinctly convey to the convening authority the conclusions of the court.[3] As already indicated,—while a majority vote will properly govern in determining questions previously arising in the course of the proceedings, the minority are not obliged to yield to the majority in the expression of the *opinion*. Thus where the members are unable to unite in a single joint opinion, their dissenting or different opinions, duly subscribed, will be spread upon the record.

The completed record will then be authenticated, in the same form as the record of a court-martial, and as prescribed by Art. 120,[4] and thereupon transmitted to the commanding officer or the President.

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[1] See Macomb, 92; O'Brien, 290–1; De Hart, 277–8. In the Scott-Gaines Court of Inquiry, (1836,) the court was ordered to report the *facts* with its opinion. It returned its opinion, accompanied only by the testimony as taken. Gen. Jackson returned the proceedings to have a summary of the evidence furnished, remarking that the facts had been "left to be gathered from the mass of oral and documentary evidence contained in the proceedings; and thus a most important part of the duty assigned to the court remained unexecuted." Am. S. P., Mil. Af., vol. 7, p. 179–80.

[2] As was done in Major Ludlow's case—S. O. 302 of 1892.

[3] Where formal charges have been investigated, formal *findings* have sometimes been made. See case in G. O. 65, Fifth Mil. Dist., 1869. Such a proceeding, however, is quite unsuitable and is now most rare.

[4] A proper form similar to that recommended for the record of a

VIII. ACTION ON THE PROCEEDINGS.

Discretion of the Reviewing Authority. This official, upon the receipt of the record from the court, may, in the absence of any statutory direction, take action thereon at his discretion. If an opinion be given, it is in no respect binding upon him, being in law merely a recommendation, to be approved or not as he may determine. If, for instance, it is to the effect that sufficient grounds exist for ordering a court-martial in the case, he may either proceed to order one, or may decide that no further proceedings are required.[1] So, where any other measure is suggested, he may adopt the view of the court, or may resort to action quite different, or may take none whatever. If action be taken, it need not be confined to strictly military means or methods. Civil or criminal liabilities may be disclosed by the testimony which should properly become the subject of an official communication on the part of the reviewing officer, addressed, through the Secretary of War, to the Attorney General, or more directly to the local authorities, with a view to suit or prosecution.

Revision by the Court. If not satisfied with the investigation, or with the report or opinion, the reviewing official may re-assemble the court, in the same manner as a court-martial, and return the proceedings with directions, either to have the investigation pursued further and completed, or the report of the facts made more detailed and comprehensive, or the opinion expressed in terms more definite and unequivocal or more responsive to the original instructions, or to correct or supply some other error or defect.[2] The inquiry not being a trial but an investigation

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court-martial, is:—A true and complete Record. Attest: A. B., President: C. D., Recorder. Compare Chapter XXIII—"Authentication of Record." Formerly, all the members appear to have signed the record. In the case of André it was subscribed by all the fourteen members.

In connection with the subject of the making up of the record of a court of inquiry, the student is referred to Chapter XXIII on the subject of the Record of Courts-martial.

[1] Or, though the court of inquiry may exculpate the accused, the Reviewing Authority may still decide to have him brought to trial; as was done by the President in Gen. Wilkinson's case, in 1811.

[2] It may here be noted that the class of errors affecting the *legal validity* of the proceedings, which may occur in records of courts-martial, are not known as such to records of courts of inquiry.

merely, the court may properly be required, upon revision, to rehear witnesses or to take entirely new testimony, or it may do so of its own motion without orders in connection with the revision.

A court of inquiry would be chargeable with dereliction of duty which should refuse to pursue an investigation or complete a report of facts, thus ordered to be perfected. Such a court, however, though it might be censured or severely criticized, could scarcely be otherwise called to account for declining to modify an *opinion*—provided it were expressed in temperate and proper language.

Promulgation. The reviewing authority, having taken final action upon the report or opinion, proceeds, regularly, to publish, in a General Order, in whole or in part, or in substance, the report of the court upon the subject of the inquiry, with the opinion, (if any,) and the determination had or action taken thereon. Upon considerations, however, of policy or justice, the President or commander may, in his discretion, delay to publish, or omit altogether to publish,[1] the report, &c., or may publish the result alone—as, for example, that it is determined that no further proceedings are called for in the case.[2]

IX. THE PROCEEDINGS AS EVIDENCE.

Before a Court-Martial. It is provided by Art. 121 that—"*The proceedings of a court of inquiry may be admitted as evidence by a court-martial, in cases not capital, nor extending to the dismissal of an officer:* provided, *that the circumstances are such that oral testimony cannot be obtained.*" By the term "proceedings" is evidently had in view chiefly the testimony;[3] and the occasion contemplated doubtless was that of a trial by court-martial of a case which had previously been investigated by a court of inquiry. In such a case it could not prejudice the interests of justice, but the reverse, to admit in evidence the sworn testimony of witnesses who had recently testified before the court of inquiry but whose personal attendance at the court-martial could not by reasonable diligence be secured. Indeed a resort to such testimony might be the only means of avoiding a failure of justice. The admission of such evidence might also be advantageous on certain other occasions—as where, for example, an officer or soldier was brought to trial by court-martial on a charge of false swearing as a witness before a previous court of inquiry, and it was desirable to prove his testimony at the latter precisely as given.

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[1] As was done with regard to the proceedings in the case of Gen. Buell, which, as noted *ante*, were never promulgated in Orders.

[2] As in the case of the charges against Gen. Martindale. See G. O. 178 of 1862.

[3] It was held in a naval case, under the naval Art. 60, almost identical with our Art. 121, that the "finding" of a previous court of inquiry in the case of an officer could not be put in evidence before a court-martial in the same case. "The findings of the court of inquiry," it is observed by the Secretary of the Navy, "were not, and could not be, in evidence before the court-martial—could not, in any manner, legally or officially influence its proceedings." G. C. M. O. 41, Navy Dept., 1888.

As to the cases *excepted* from the application of the Article, *i. e.* "capital" cases and cases "extending to the dismissal of an officer," it is to be said that by the former are meant cases of alleged offences which, by the Articles of war, would be capitally punishable[1] if found by the court, and, by the latter, cases of alleged offences of officers for which the penalty of dismissal is made mandatory upon conviction.

It is to be remarked that the admission of evidence referred to in the Article is an admission of evidence *on the merits* of the case, *i. e.* in proof of the offence charged.[2] Thus it has been held by the Judge Advocate General that the proceedings of a court of inquiry would be admissible in evidence, irrespective of the Article and in the cases excepted as well as in any other, where the object was, not to prove or disprove a charge, but to impeach the evidence of a witness on the trial by showing that he had made a different statement on oath before the court of inquiry.[3]

The proceedings of the court of inquiry will properly be *proved* before the court-martial either by the original record of the inquiry, or by a copy of the same certified by the Judge Advocate General, or other official in whose custody the original may temporarily be.

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[1] As to the definition of the term "capital" as used in the Articles of War, see Chapter XX—"Death."

[2] G. O. 33, Dept. of Arizona, 1871.

[3] This opinion is published as approved by the President in G. C. M. O. 40 of 1880.

Before a Civil Court. The question of the admissibility in evidence of the record of a court of inquiry at a trial before a *civil* court was determined in the negative in England by the well-known case of Home *v.* Lord Bentinck.[1] This was an action brought in the Court of King's Bench by a Lieut. Colonel of the British army, whose alleged misconduct had been investigated by a court of inquiry, against the president of the court, for a libel claimed to be contained in the opinion. The plaintiff presented as evidence the original record of the court, which, upon objection by the defendant, was ruled out as inadmissible: a copy of the record was then offered with a similar result. Upon an appeal to the Court of Exchequer Chamber, these rulings were sustained on the ground that the opinion of the court constituted a privileged communication. Dallas, C. J., observed:—"What was the report in its very nature but a confidential communication, in consequence of a direction by the Commander-in-chief, for the information of his own conscience in the exercise of his public duty?" And he holds that—"upon the broad principle of state policy and public convenience, * * * these matters, secret in their natures and involving delicate inquiry and the names of persons, stand protected."[2]

This ruling would be applicable to a similar case at American law. But in our military practice the results of the investigations of courts of inquiry are in the majority of cases promulgated in Orders, and in a case in which such a publication had been made the report or opinion published could not be held to be a privileged communication, though the testimony or proceedings not published might still be so considered.

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[1] 2 Brod. & Bing., 130.

[2] The Chief Justice further holds, (p. 162,) that it would have been the duty of the court, considering that the document was a secret communication, not the property of the party holding it but of which he was a trustee on behalf of the public, to interpose and prevent its admission, even if no objection had been raised,—in the same manner, he adds, as witnesses "are not to be asked the names of those from whom they receive information as to frauds on the revenue." And with this case, see Dawkins *v.* Lord Rokeby, 8 Q. B. 255; Manual, 174, 176; also—generally—PART III, *post.*

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